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JOHN T. FEY, C

No. [redacted]949

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

MONOLITH PORTLAND MIDWEST COMPANY, a Corporation,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit herein.

OPINIONS BELOW

The District Court's Opinion is reported at 128 F. Supp. 824. The opinion of the Court of Appeals for the Ninth Circuit (R. 339) is reported at 240 F. 2d 444.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 7, 1957. (R. 347). Rehearing was denied without opinion on April 1, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the "fair compensation" guaranteed by the Contract Settlement Act of 1944 for termination of a contract to test an experimental alumina process is limited to mere reimbursement of out-of-pocket expenses; or whether the court may consider the substantial value of such contract in fixing "fair compensation" as this Court did in *De Laval v. United States,* 284 U.S. 61 (1931) and all similar cases.
2. (a) Whether such a contractor whose contract is terminated so that a governmental agency may complete the contemplated experimental operation, may maintain a suit against RFC, the Government's designated financial agent, for the *quantum meruit* value of the Government's post-termination, beneficial use of the *res* created; and,

   (b) Whether such a claim may be asserted as an element of, or evidence of "fair compensation" in a Section 13(b) suit under the Contract Settlement Act of 1944, or independently thereof, but joined to a claim for relief under the Act.

3. Whether it is proper in a suit for compensation under the Contract Settlement Act, to extend the *prima facie* correctness of a contracting agency's *ex parte* findings on termination claims to findings by the agency in its own favor exceeding the award to the war contractor, for events arising after the termination, and to render judgment for the agency on such claims solely on such presumption, in the face of substantial uncontradicted evidence to the contrary.
4. Whether it was error for the courts below to deny normal court costs to petitioner, the prevailing party, contrary to the rule announced by this Court in *RFC v. J. G. Menihan Corp.*, 312 U.S. 81 (1941).

STATUTES INVOLVED

The pertinent provisions of the Contract Settlement Act of 1944, 58 Stat. 649, 41 U.S.C. 101 *et seq.*, and the War Mobilization and Reconversion Act of 1944, 58 Stat. 785, 50 U.S.C. App. 1651 *et seq.*, are set out in the Appendix, pp. 13-28.

STATEMENT OF THE CASE

1. Nature of the Case and Present Status

The status of this action[1] for compensation under the Contract Settlement Act of 1944 is that the judgment of the district court has been reversed and remanded for trial by jury. (R. 347). The Court of Appeals approved the trial court's limitation of compensation to expenses only, (128 F. Supp. 824, 842, 846) and gave no consideration to the value of petitioner's contract, or the value of the Government's use of petitioner's admittedly valuable process, as elements of "fair compensation." (240 F. 2d. 444, 449).

This question is of national importance, involving two basic industries (alumina and cement), a remedial Congressional direction to pay "fair compensation," and the continuing necessity for consistent, fair compensation to contractors whose contracts are terminated for the convenience of the Government or its corporate agents.

The decisions of the lower courts are in conflict with all reported decisions upon the question of compensation. This conflict should be eliminated before jury retrial instead of afterward, in this, the eleventh year of litigation.

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[1]The litigation has been before the courts for over ten years. Reported decisions in the first action, are reported as: *Monolith Portland Midwest Company v. Reconstruction Finance Corporation*, 178 F. 2d 854 (9 Cir. 1949), cert. den. 339 U.S. 932 (1950); Interlocutory decisions in this case are reported as: *Monolith Portland Midwest Co. v. Reconstruction Finance Corp.*, 95 F. Supp. 570 (1951) striking portions of petitioner's complaint and limiting petitioner to expenses only, and 102 F. Supp. 951 (1952), denying petitioner's request for jury trial.

2. Contract Right

The Ninth Court's 1949 opinion denying relief for non-exhaustion of administrative remedy acknowledged the motivation for the contract in suit.[2] Petitioner and the United States desired to determine commercial feasibility of extracting alumina from inexhaustible native ores by petitioner's process, which simultaneously produced partially processed cement. The commercial test of this unique plant for at least 90 days was the basic consideration for petitioner's execution of the contract. The underlying purpose was to free America from the cost and hazard of importation by using native ores in the strategic billion dollar aluminum industry.

On September 10, 1946, after petitioner had substantially completed the plant, respondent[3] gave notice

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[2]"The contract in suit was made on June 28, 1943 between appellant (petitioner), a cement company, and Defense Plant Corporation, a subsidiary of respondent Reconstruction Finance Corporation. The motivation for the contract was the mutual desire of appellant (petitioner) and the United States Government to determine the feasibility of commercially extracting alumina from our native anorthosite ores by a method developed (later patented) by appellant (petitioner). Defense Plant Corporation undertook to furnish the money necessary to construct and operate a test plant. Appellant (petitioner) agreed to supervise the construction of the plant and to license to Defense Plant Corporation the use of its process. The contract provided that appellant (petitioner) should operate the plant for Defense Plant Corporation for ten years subject to the right of either party to cancel the operating agreement upon thirty days notice, at any time after 60 days after completion of the plant. Defense Plant Corporation agreed that should it decide to dispose of the plant during the continuance of the operating agreement or within six months of its termination, appellant (petitioner) would have the first option to purchase." (*Monolith Portland Midwest Company v. Reconstruction Finance Corporation*, 178 F. 2d 854, (9th Cir. 1949).

[3]In 1945, Congress dissolved Defense Plant Corporation and respondent assumed Defense Plant Corporation's liabilities. Joint Resolution (Public Law 109) of June 30, 1945, c. 215, 59 Stat. 310.

of cancellation, justifying its notice under the War Mobilization and Reconversion Act of October 1, 1944. (R. 79). Respondent had no contractual right to cancel. On June 26, 1946 respondent and other agents of the Government (including Aluminum Industry representatives), met and determined to terminate petitioner's contract and hold the unique plant for operation by the Bureau of Mines.[4]

Although petitioner in writing protested and gave notice of its claims (Exhibits 136-144), the June 26th decision to appropriate petitioner's process and use the plant was carried out. The Bureau of Mines, after obtaining appropriations totalling $2 million, completed the plant and to some degree operated it. (T. 3644-3648, 3666-3696, 3728-3729; Exs. 21, 21A, 102, 102A). To date no report of the results of its operation has been made to the public.

After the Bureau of Mines abandoned the plant, its disposal was the subject of Congressional investigation. Its sale to Ideal Cement Company in 1955, was approved by the House Government Operations Committee, conditioned upon retention of the alumina testing facilities intact for ten years.

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[4]A memorandum of the conference of interested government agencies on June 26, 1946, (Exhibit BF) records that:

It was the consensus of opinion that ". . . *the best interest of the Government would be served by* Reconstruction Finance Corporation effecting the termination of the operating agreements covering the Harleyville and Laramie alumina plants . . . placing and holding the Harleyville and Laramie plants . . . in stand-by condition . . . thus affording to the Bureau of Mines, Department of Interior, an opportunity to obtain Congressional sanction for the use of the plants for further experimentation. . . ." (Italics ours).

To date, petitioner has not even been repaid the monies expended or expenses incurred in designing, equipping and creating the unique alumina pilot plant located at Laramie, Wyoming.

3. Admitted Events Establishing the Value of Petitioner's Process

In 1941 the Government solicited industry to aid in the solution of the existing aluminum crisis. (T. 123, Exhibit 17). Reynolds had been operating about one year, and Alcoa was the sole historical producer. (Exhibit 16, App. A, pp. 318-321).

In January 1942, petitioner submitted its cement-alumina process to the Government in confidence. (T. 128-150). The W.P.B. reported in March 1942, that this was the type of process it had been waiting for because all materials mined were used. (Exhibit 44). Petitioner was requested to demonstrate its process through a test plant stage. (T. 151-155).

On June 8, 1942 Alcoa recommended, and there was appropriated $56,000,000 to produce alumina from the then dwindling supply of the Nation's low-grade bauxite. (Exhibit 16, p. 196). The process used petitioner's process steps or their equivalent upon low-grade bauxite only, with no contemporaneous cement product. (T. 3365-3368). A plant was built at Hurricane Creek, Arkansas adjacent to the nearly exhausted sole domestic bauxite deposits. (Exhibits 16, p 202, 96, A-D). This plant was completed about 1945, and after Alcoa-Attorney General anti-trust negotiations was sold to

Reynolds Metals Company. (Exhibit 16, pp. 318-321). The negotiations involved Alcoa's claim that its process which the Hurricane Creek plant was built to use had a value of from $10-12 per ton. (Exhibit 20, App. E, p. 77). As of time of trial in 1953 the aluminum industry produced over 3,000,000 tons of alumina per year. (Exhibit 132).

During the period March 1942 to April 1943 petitioner demonstrated its process to W.P.B. by a test plant operation at its own expense. (T. 5171-5173). The W.P.B. recommended, and the Secretary of War directed, that respondent (Defense Plant Corporation) execute a contract with petitioner for the unique Laramie, Wyoming pilot plant. (Exhibits 51-54). The documents confirm the purpose of the plant to be:

> ". . . an experimental unit with the sole objective of determining whether or not the process can be applied successfully to the production on a large scale of alumina from anorthosite and/or clay." (Exhibits 52, 58, 110).

The importance to the national economy of a combined process producing alumina and cement, in times of peace or war, is partially stated in *United States v. Aluminum Company of America,* 91 F. Supp. 333, (S.D. N.Y. 1950): (p. 410)

> ". . . the refinement of these processes (alumina-from-clay) . . . constitutes an important avenue, if not the major avenue, of development in the industry. The elimination of the need for

foreign bauxite supplies could easily provide the initiator of a successful process with a tremendous cost advantage and would contribute greatly to our national security . . ."

After expenditure of $665,000,000 on plants alone in the wartime aluminum program (Exhibit 20, p. 3), the Government has directly or indirectly poured hundreds of millions of dollars into the aluminum program since the war.[5]

As the Congressional Committee said in recommending further alumina experimentation by government subsidy (Exhibit 20, p. 13):

". . . That would be cheap insurance for a nation that has just spent over $200,000,000,000 for a war won largely by aluminum airplanes."

At the end of the war, the Government commenced to dispose of its alumina and aluminum plants.[6]

Some disposals were finally effected by Alcoa's grant of a royalty-free license of the process used in the Hurricane Creek Alcoa operated government plant, to new producers, at the demand of the Surplus

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[5]Tax depletion allowances, short term "write-offs" subsidies, guaranteed purchase, e.g., Exhibit 19, pp. 7-8, government loans, and special priorities. All this has been done in an effort to comply with the policy announced by Congress (Exhibit 20, p. 44):

"It should be the deliberate national policy to keep the United States in a position second to no other nation in the size and technical progress of its light metals industry."

[6]Although many potential purchasers were interested in such purchases:

". . . All of the bidders except Alcoa, however, required Government assurance that bauxite would be available to them, or that it would be possible to purchase alumina at a competitive price" (Exhibit 16, p. 320).

Property Administrator (Exhibit 16, p. 321). However, Alcoa still dominated the industry.[7]

The Mobile, Baton Rouge and East St. Louis plants, three of the four plants expanded or built to use the low-grade bauxite process claimed by Alcoa, were abandoned. (T. 605, 3376, 3840-3844). The Mobile and Baton Rouge sinter plants were sold to the Ideal Cement Company (petitioner's competitor) for cement plant use at a price approximately 15% of their cost (T. 3857).

Only four alumina-from-clay experimental plants, each involving a different process, were authorized and built during the war (T. 603, 637-638). Three of these plants, after unsuccessful test, were cannibalized and sold by the Government at an average of about 13% of their cost. (T. 645, 646, Exhibit AA, R. 230-231). The Laramie project alone, admitted by the Bureau of Mines to be the best process submitted (T. 3721-3729), was terminated for the purpose of continued operation and thereafter operated. (Exhibit B-F).

After the Bureau of Mines completed its beneficial operation,[8] the Laramie plant was sold to Ideal Cement Company, for $1,373,000—about 31% of its original cost.

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[7]As the court said in *United States v. Aluminum Co. of America*, 91 F. Supp. 333 (S.D.N.Y. 1950): (p. 380)

"Such competition as presently exists in the domestic production of primary aluminum is due, almost entirely to the disposal program of the War Assets Administration. Reynolds and Kaiser are the beneficiaries of the execution of that program, and their existing financial structures, together with their respective capacities for development, must be viewed in the light of the governmental patrimony that has been showered upon them."

[8]The trial court held: 'the Government's money was well spent" in the Laramie plant (R. 266). Bureau of Mines used the plant as built (T. 3727-3728).

The parties stipulated below that the reproduction cost of the Laramie plant as of February 25, 1947, was $5,941,000 (R. 233), and as of March 1, 1950 was $6,712,000 (R. 233) or a gain of about $2,300,000 over its original cost, at the time the Bureau of Mines beneficially operated it.

4. The First Action

In 1946, petitioner commenced an action for compensation and to enjoin the cannibalization or other disposal of the plant, in order to minimize the loss it sustained by termination, after first advising RFC in detail of its claims. (Exhibits 136, 137, 139).

The District Court dismissed the action on the ground that petitioner had not obtained findings on its claims, and had not exhausted the remedy provided by the Contract Settlement Act of 1944. Upon appeal, the Circuit Court affirmed, holding that petitioner's sole claim to relief stemmed from the Contract Settlement Act. *(Monolith Portland Midwest Company v. Reconstruction Finance Corporation,* 178 F. 2d 854, 9th Cir., 1949).

This Court denied certiorari, 339 U. S. 932 (1950).[9]

[9]The Solicitor General then argued: "Petitioner has been remitted by the decision of the Court of Appeals to its administrative remedy. Subsequent to utilization of that remedy, petitioner may seek appropriate court review. In no sense have the courts below ruled on the merits of petitioner's termination claim." (Res. Br. 5).

5. Petitioner's Termination Claim

Petitioner filed a termination claim with RFC on January 16, 1950 (Exhibit N, l. 7) incorporating its 1946 notices and requests for settlement. RFC issued its *ex parte* Findings thereon on June 7, 1950 (R. 134). It there determined that any claim for relief or compensation in excess of petitioner's out-of-pocket expenses was improper. It found itself entitled to some $460,000 plus interest for damages allegedly incurred by being restrained by injunction from liquidating or "cannibalizing" this plant as it did all other experimental alumina plants following the war. This notwithstanding its pre-termination decision not to dispose of the plant—but to appropriate petitioner's process for Bureau of Mines operation of the plant (Exhibit B-F).

6. Error Below

By its complaint (R. 7), petitioner alleged the contract, its performance in creating the unique plant (including its costs), the termination notice and claims, the damages suffered thereby, and the existence of a dispute. It prayed for general declaratory relief, injunction, and compensation.

Long before trial the court declared the law to be that petitioner was limited by the Contract Settlement Act to its expenses only, and struck all allegations as to petitioner's damages flowing from the termination. (95 F. Supp. 570, (1951); R. 91-115).

Subsequently, the court denied petitioner's request for jury trial. (R. 162-173; 102 F. Supp. 951, 1952).

The case was tried by the court, November 5, 1952-February 20, 1953. Petitioner contended that it was erroneous to limit the compensation and relief accorded by the CSA to mere out-of-pocket expenses, and that it was entitled as a matter of law to have the "value of the contract", and the value of the Bureau of Mines operation taken into account in fixing "fair compensation."

On January 20, 1955, the trial court rendered its opinion (128 F. Supp. 824), followed by its Findings of Fact, Conclusions of Law and Judgment (R. 246-312) on February 10, 1955. In essence, the trial court:

(1) Confirmed its earlier refusal to consider the "value of the contract," the *quantum meruit* value of the Government's use of the plant, or any other elements except out-of-pocket costs, in fixing "fair compensation" under the Contract Settlement Act. (128 F. Supp. 824, 836, 846, R. 310).

(2) Ruled that Congress deliberately selected "fair compensation" as a phrase of art distinct and different from "just compensation"; (R. 259)

(3) Adopted R.F.C.'s *ex parte* Findings *in toto,* including the findings where R.F.C. purported to adjudicate its own affirmative claims against petitioner for events arising after the termination, and allowed R.F.C. some $150,000 on its $460,000 counter-claim;

based upon an assumed depreciation of the plant prior to the Bureau of Mines beneficial use.

7. The Decision of the Court of Appeals

Upon appeal the Court of Appeals below vacated the judgment and remanded the case to the District Court with instructions to grant a jury trial. (240 F. (2d) 444). The court devoted 6½ pages of an 8-page opinion to the jury trial point, and briefly concluded as to petitioner's claims for other than its costs: (p. 449)

> "In these respects, as well as on the questions of the termination of the contracts, 'fair compensation,' etc., we hold that the District Court correctly narrowed the factual issues."

8. Petitions for Rehearing.

Thereafter, respondent petitioned for rehearing on the jury trial issue, and petitioner petitioned for clarification, rehearing, and/or certification of the issue of "fair compensation" to this court. Both petitions were denied without opinion on April 1, 1957. The Court of Appeals also denied petitioner its normal costs of appeal.

REASONS FOR GRANTING THE WRIT

A. The Decision of the Court of Appeals, Affirming the Trial Court's Limited Construction of the "fair compensation" Provided in the Contract Settlement Act, to Mean Reimbursement of Expenses Only, Involves An Important Question of Federal Law Fundamental to the Conduct of the Case. It is Erroneous and Contrary to All of the Decisions of This Court. If Not Reversed, No Citizen Can Rely Upon Fair Treatment When Contracting With the Government.

1. The "fair compensation" provided by the Contract Settlement Act to a contractor whose contract has been terminated for the convenience of the Government is identical to the "just compensation" allowed for other comparable Government takings.

The basic and all-permeating error of the trial court was its holding that "fair compensation" was deliberately used as a phrase of art by Congress to provide a "different measure of recovery" than just compensation (128 F. Supp. 824, 842), citing no direct authorities or legislative history in support of its radical departure from the century old judicial recognition that the generic noun "compensation" is controlling, and that the various adjectives such as "just," "fair" or "reasonable" add nothing to the provision.

The trial court's decision is in square conflict with all of the many decisions of this Court and the Courts of Appeal dealing with "compensation", and the court

below cites no reason for distinguishing such well considered and established precedents.

Thus, *United States v. Peewee Coal Co.*, 341 U.S. 114, 118 (1951) when discussing *just compensation* under the Fifth Amendment, speaks of:

> ". . . the Government's obligation to pay *fair compensation* for property taken . . ." (Italics added).

In the early case of *Monongahela Navigation Co. v. United States*, 148 U.S. 312, (1893) the court said: (p. 326)

> ". . . The noun 'compensation', standing by itself, carries the idea of an equivalent . . . so that if the adjective 'just' had been omitted and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property."

In *Wilson Athletic Goods Mfg. Co. v. United States*, 161 F. 2d 915 (CCA 7th 1947) the court, in construing the "fair and just compensation" provision of the Act of October 16, 1941 (50 U.S.C.A., App. Sec. 721), stated: (p. 917)

> "A fair, just and reasonable compensation means one that takes into account all factors . . ."

The same Congress that enacted the Amendments and Extensions to the Act of October 16, 1941 enacted the CSA. Interchangeable use of the adjectives "fair"

and "just" by this same Congress, approved by the courts, completely negatives the asserted congressional intent that the "fair compensation" in the CSA was intended to provide "a different measure of recovery" than that traditionally employed for governmental invasions of private property.

As the court said in *New Haven Water Co. v. City of New Haven,* 106 Conn. 562, 139 A. 99 (1927), when urged by counsel to distinguish "fair compensation" and "just compensation" held: (p. 105)

> " . . . (this question) becomes immaterial since both mean the same thing. 'Just' is the equivalent of 'fair'."

In light of this court's recent concern with over-restrictive definitions of the elements of just compensation which are more concerned with form than substance *(United States v. General Motors Corp.,* 323 U.S. 373 (1944)), petitioner strongly submits that the trial court's error in its restrictive limitation of "fair compensation" to reimbursement of expenses only requires that certiorari be granted. This Court should correct such error, otherwise a Congressional direction to "fairly" compensate a contractor for termination of his contract will be ignored. A decision on this point will be fundamental to the further conduct of the case below.

2. "Fair Compensation" provided by the Contract Settlement Act includes the "value of the contract" terminated for the convenience of the Government, in accordance with the principles enunciated by this Court in *De Laval v. United States*, 284 U.S. 61 (1931), and other similar cases.

The trial court ruled that "fair compensation" did not include the "value of the contract" (128 F. Supp. 824, 846; C. of L. XXVIII, R. 298). Value of the contract of necessity is evidenced by the value of the detriment petitioner suffered by being deprived of its primary consideration, and by the benefits conferred by petitioner's performance, including furnishing a process, "know-how" and expenses, which resulted in a pilot plant. The Court of Appeals did not discuss or mention the point of value in its brief and sketchy discussion of issues other than jury trial. However, its statement that the trial court's rulings on "fair compensation" "correctly narrowed the factual issues" (240 F. (2d) 444, 449) apparently approved the trial court's conclusions of law striking the pleadings upon this aspect of compensation and limiting the issue. This ruling was erroneous because it is in direct conflict with decisions of this Court holding that where a contract is terminated, cancelled, or taken, the "value of the contract" is a proper element of the compensation for the taking.

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893);

Seaboard Air Line Railway Co. v. United States, 261 U.S. 299 (1923);

United States v. New River Collieries Co., 262 U.S. 341 (1923);
Brooks-Scanlon Corporation v. United States, 265 U.S. 106 (1924);
De Laval Steam Turbine Co. v. United States, 284 U.S. 61 (1931).

As this Court said in *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61, (1931), which involved the question of a war contract "cancellation" or termination, in deciding that the "value of the contract" was a proper and essential element of "compensation": (p. 71)

> " 'It is the sum which, considering all the circumstances—uncertainties of the war and the rest —probably could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy'."

The trial court apparently labored under the misapprehension that the RFC had not "taken" anything of Monolith's and therefore the rules of compensation announced by the Supreme Court did not apply. (128 F. Supp. 824, 842). This was erroneous as a matter of law. In *United States v. General Motors Corporation*, 323 U.S. 373 (1944) the court clarified the meaning of a "taking" when it said: (p. 378)

> "In its primary meaning the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

Thus, the termination by RFC of appellant's contract and the destruction of appellant's rights under the contract, together with the Government's continued operation of the plant, was clearly a taking.

3. The "fair compensation" provided by the Contract Settlement Act includes the *quantum meruit* value of the Government's post-termination beneficial use of the alumina plant through Bureau of Mines.

Although the contract in suit was terminated under the War Mobilization and Reconversion Act of 1944, by a September 10, 1946 "Notice of Cancellation" (R. 79) which recited:

"... the facilities are no longer required ..."

the blunt fact is that the Government had resolved some three months earlier to terminate so that the Bureau of Mines—instead of petitioner—could carry on the experimental operation provided by the contract. (Exhibit B-F, R. 76, 77).

In plain English, the contracting agency framed its Notice of Cancellation in an attempt to comply with the requirement of Section 202 of the War Mobilization and Reconversion Act that contracts so terminated are no longer used or needed by the Government. The Government was apparently prevailed upon to state this reason in respondent's cancellation notice, because the decision had then been made to proceed with the experimental operation. (Exhibit B-F). By the simple expedient of termination, the Government was led to believe, or was prevailed upon to believe that it could obtain the desired results without fairly compensating petitioner. It deliberately singled out the one process the Government had "been waiting for" (Exhibit 44) and terminated petitioner's contract, with the intent to continue using it.

The Bureau of Mines thereafter spent some $2,000,000 in an experimental operation using petitioner's patented process. The details and report of this operation have yet to be made available to the public or petitioner.

The procedure employed in this case by the agencies concerned calls to mind the language of this Court in the case of *Lichter v. United States*, 334 U.S. 742 (1948): (p. 754)

> "In procedure which affects property rights as directly and substantially as that authorized by the Renegotiation Act, the governmental action authorized, although resting on valid constitutional grounds, is capable of serious abuse . . . Within procedure thus authorized by the Constitution,

> the Congress and the Administration, and here affirmed, *resulting injustices can and should be carefully examined and as far as possible, relieved . . .*" (Italics added).

Petitioner submits that the inequitable conduct by responsible public officials in this transaction should be corrected in the only way now possible—by payment of "fair compensation" which will include the benefits obtained by the Government and the detriment suffered by petitioner by the termination.

As the Supreme Court stated in *Dermott v. Jones*, 64 U.S. (23 How.) 220 (1859): (p. 233)

> ". . . Still, if the other party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred is really worth . . ."

In this case there were three important rights or interests—the contract for construction and operation, the acceptance of the benefits of appellant's construction, and the licensing contract by which appellant shared its patents with RFC.

When RFC terminated the contract, it "took" the contract by destroying it, and thereafter, its principal, the United States, used the patented process and the unique plant. The termination thus in practical effect destroyed the years of patent life dedicated by petitioner to the Laramie project, and the years required

to build and bring a new plant to the point of operational test of the patented process. By the Contract Settlement Act, Congress designated respondent as the financial agent of the United States to pay fair compensation in an amount determined by a court of competent jurisdiction in accordance with existing law.

Appellant submits that this state of facts brings the case squarely within the analogy drawn by the Supreme Court in *United States v. General Motors Corporation,* 323 U.S. 373 (1944).

There the petitioner was the owner of a long-term lease. The Government by condemnation, carved out a short-term occupancy, and the court allowed compensation pro-rata on a long-term basis only, refusing petitioner's proof of actual losses as elements to be considered in fixing compensation. The Supreme Court held: (p. 382)

> "It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding, chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the 'market rental value' for the chips so cut off. This is neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates."

4. The "fair compensation" provided by the Contract Settlement Act is not limited to mere reimbursement of out-of-pocket expenses.

The trial court held that petitioner's recovery was limited to mere reimbursables only under Section 6(d) of the Contract Settlement Act. (128 F. Supp. 824, 842). This holding was in error for many reasons, for example:

(a) It is contrary to the many decisions of this Court stating the principle that the ascertainment of compensation is a judicial function—not a legislative function. *(Monongahela Nav. Co. v. United States,* 148 U.S. 312, 327; *Seaboard Air Line Ry. Co. v. United States,* 261 U.S. 299, 304).

(b) It is contrary to the intent of Congress as shown by Congressman Wolverton's explanation of the Act (90 Congressional Record 6076):

> ". . . No existing remedy that a claimant now has under the law is taken from him, but in addition thereto he is given an opportunity to avail himself of a settlement procedure that can facilitate his settlement if he desires . . ."

(c) It is contrary to the internal evidence of the Act itself which clearly shows that the standards for settlement enumerated in Section 6(d) were for guidance to agency settlements only and are not binding on the courts in a Section 13 suit.

The term "fair compensation" is the most important phrase used in the Act. If, as the trial court as-

serts, it is a phrase of art and intentionally used by Congress to restrict the compensation paid to reimbursables only, Congress would surely have defined it in Section 3 when it defined eighteen other words and phrases used in the Act. Or, it would have been quite simple to add to Section 6 or Section 13 the words: "no additional compensation shall be paid except as herein provided," or other words of limitation. Had Congress intended to limit the plain and literal meaning of "fair compensation," it could easily have found apt words to do so. *(United States v. Lexington Mill & Elevator Co.,* 232 U.S. 399, 1913).

Petitioner submits that it is clear that Congress did not attempt to limit proper judicial inquiry under Section 13 as to what would be "fair" or "just" or "equitable" under any given circumstances. After obtaining *ex parte* findings by the agency, the contractor remains free to pursue his traditional court remedy. (Section 13(b).) In such proceeding the court will consider the claim made, and subject only to the *prima facie* correctness of the facts found by the agency, will determine "fair compensation" "in accordance with existing law . . ." (Section 13(b)(2)), and will enter judgment on the "law and the facts" (Section 13(c)(3)). It is settled that such a direction in a remedial statute such as the Contract Settlement Act authorizes such judgment:

> ". . . as, under all the evidence, would be consistent with law . . ." *(United States v. Cumming,* 130 U.S. 452, (1889).)

Section 6 of the Act, relied upon exclusively by the trial court in limiting petitioner to reimbursables (128 F. Supp. 824, 842), merely requires the agencies (not the courts) to negotiate speedy settlement of war contract claims after considering certain designated standards, "in accordance with the terms of this Act." Section 6 does not even purport to limit a court in the required judicial determination of compensation in fact. The trial court's narrow, restrictive interpretation ignores the balance of the Act, including Section 13, where Congress repeatedly directs that contractors be fairly and equitably compensated. In addition, it is "tailored" to the necessities of the agency, revives the discredited "most favored litigant" status for governmental corporations, and thwarts substantial justice.

Petitioner submits that in a Section 13 suit for fair compensation, as in any other suit for compensation for a governmental taking, the test should be the requirement of "just compensation". The most reasonable solution is to award compensation to the owner as determined by a court under all the circumstances of the particular case. *(United States v. Peewee Coal Co.,* 341 U.S. 114 (1951).

The declaration in Section 1 of the Contract Settlement Act that an objective of the Act is:

> ". . . (b) to assure to prime contractors . . . speedy and equitable final settlement of claims . . ."

as well as the prohibition of Section 20(e) that:

> "Nothing in this Act shall be deemed to *impair* or modify any war contract . . ." (Italics added)

alone clearly demonstrate the errors below.

5. The Court below mistakenly overlooked the declaratory relief sought by Petitioner.

In the third cause of action of its original complaint petitioner incorporated the previous factual allegations of its complaint, which merely alleged the ultimate facts of the transaction (R. 23), that an "actual controversy" existed and that there should be a judicial declaration of rights (R. 24) and prayed: (R. 26)

> "8. That the Court determine and declare the legal rights and duties of the plaintiff and defendant in the premises."

In response to RFC's motions to strike, etc. (R. 82 *et seq.*) the trial court in its Opinion of January 22, 1951 (R. 91, 95 F. Supp. 570) stated: (R. 11[illegible])

> ". . . The motion to strike is denied as to plaintiff's third cause of action for declaratory relief and this court, by this opinion has declared the rights of the parties in the controversy between them."

As pointed out above, the trial court had, by such opinion, limited petitioner to reimbursables only. It thereafter confirmed this restrictive interpretation of

the CSA by its final opinion (128 F. Supp. 824) and it Findings of Fact and Conclusions of Law. (R. 246).

Therefore, the correctness of the trial court's declaration of the rights and duties of the parties arising out of the transaction and under the CSA, was squarely before the Ninth Court on appeal. (Points on Appeal, #1(a), R. 323; Spec. of Errors, #1, 2, Appendix I, pp. 1-5).

This point is based not on a play on the words "breach of contract" or "specific performance" etc., but upon the ultimate facts well pleaded, and the construction of the CSA.

Petitioner apprehends that the Court below may have been misled by the trial court's final opinion (128 F. Supp. 824) into believing that the only legal points (doubtful as they are) involved as to "fair compensation" (except reimbursables) were the propriety of "breach of contract" and "specific performance" under the CSA (e.g., see 240 F. 2d 444, 449). Such is not the case.

Leaving aside the first two causes of action the plea for declaratory relief still demands review. Was the trial court correct, or was it in error when it limited appellant's recovery to reimbursables as a matter of law?

B. The Decision of the Court of Appeals, Approving the Trial Court's Unqualified Acceptance of the Contracting Agency's Findings Has Decided an Important Question of Federal Law in a Manner Inconsistent With the Decisions of This Court.

The trial court ruled that all of RFC's *ex parte* findings (without hearing) were *prima facie* correct. (128 F. Supp. 824, 879). Based on this presumption, the court allowed RFC some $150,000 in *affirmative* relief, (on a cross-claim for $460,000) for alleged damages suffered by reason of the injunction *after* the termination. This ruling was erroneous and plainly prejudicial, and denied petitioner procedural due process.

The Contract Settlement Act provides in Section 13 that the contracting agency shall make findings:

> ". . . upon *his* (the contractor's claim or part thereof . . ." (Italics added).

When petitioner filed its claim, RFC, by its *ex parte* findings asserted a cross-claim for injunction damages. This was a claim for affirmative relief. The findings determined that petitioner was indebted to RFC. At trial petitioner relied upon the stipulated evidence that the plant had *in fact* increased some $2,300,000 in value (Exhibit AA) and not depreciated, as RFC claimed in its findings, and that it had thereafter been extensively and beneficially used by the

Government.[10] The trial court ignored this evidence and relied upon the supposed presumptive correctness of RFC's findings of "paper depreciation" during the injunction.

Petitioner concedes the procedural propriety of RFC's cross-claim in a Section 13 suit, but earnestly denies the premise that RFC could exceed the finding making power in the Act, and by the simple device of making *ex parte* findings, shift its own burden of establishing the right to affirmative relief, and recover solely on the strength of the supposed presumption of correctness. This becomes even clearer when it is remembered the Court ignored evidence to the contrary.

Petitioner submits that the trial court's misconstruction of the scope, extent and effect of *ex parte* agency findings under the Act is contrary to fifty years of uniform construction of the finding making power of administrative agencies, upon judicial examination thereof.

By such a procedure as was here authorized, RFC is at the same time a party, an expert witness, a lawyer, a judge and a jury. Such was not the intent of Congress in enacting the remedial Contract Settlement Act.

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[10]Thereafter, the plant was sold to petitioner's competitor, Ideal Cement Company for much more than similar plant disposals, e.g.: Ideal bought the Mobile and Baton Rouge Plants for 15% of cost. (T. 3857). The sale of the other 3 experimental plants averaged 13% of cost (Exhibits AA, R. 230). The Laramie Plant sale brought 31% of cost.

CONCLUSION

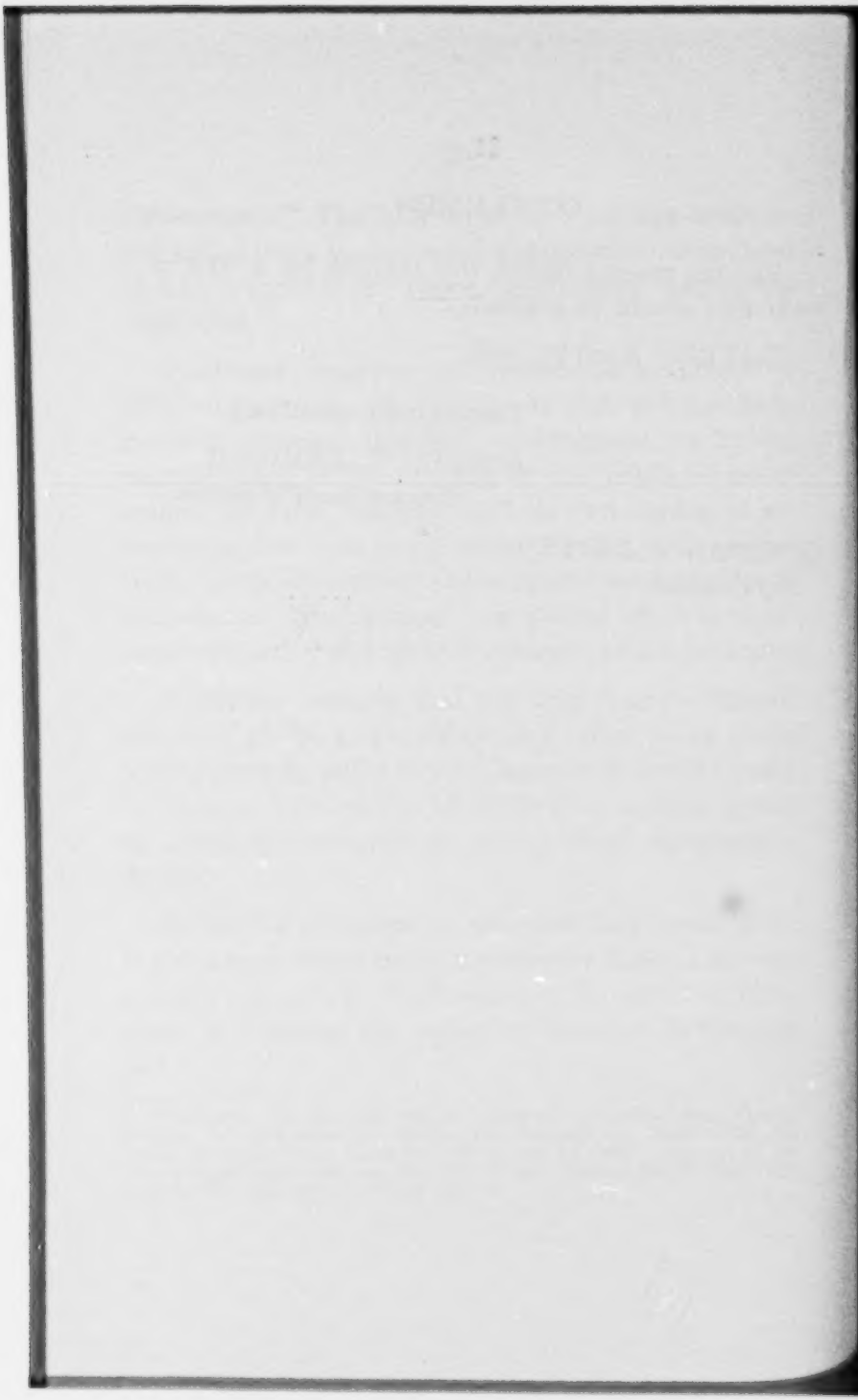
For the reasons stated, this petition for a writ of certiorari should be granted.

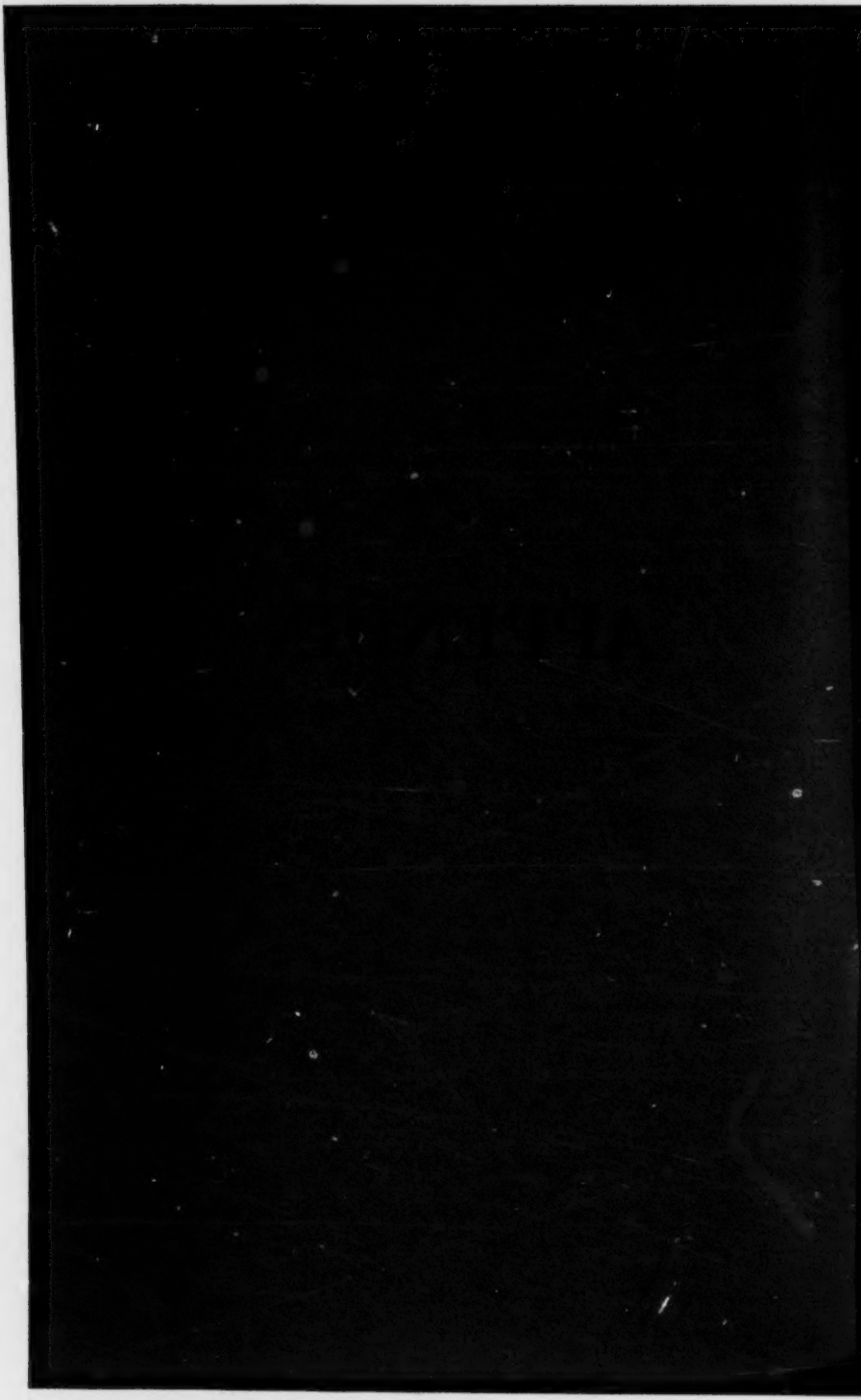
DATED: April 30, 1957.

Respectfully submitted,

JOSEPH T. ENRIGHT,
Counsel for Petitioner.

NORMAN ELLIOTT
Of Counsel.





APPENDIX

A. OPINION AND JUDGMENTS BELOW

1. OPINION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT, 240 F. 2d 440, January 7, 1957.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONOLITH PORTLAND MIDWEST COMPANY, a corporation, Appellant,	)	No. 14,841
vs.	)	Jan. 7,
RECONSTRUCTION FINANCE CORPORATION, a corporation, Appellee.	)	1957

Appeal from the United States District Court for the Southern District of California, Central Division

Before STEPHENS, LEMMON, and HAMLEY, Circuit Judges.

LEMMON, Circuit Judge.

Attorneys often give high rhetorical praise to the function of a jury under the common law system—and then, when it suits their clients' purposes, in order to defeat an adversary's demand for a jury trial they

invoke "Governmental immunity", "lack of statutory right", "inappropriateness", etc.

In the instant case, we do not propose to lend ourselves to any such ambivaluation of that potent instrument of Anglo-American law.

Nor will the fact that we are urged to do so by counsel for a Government-owned corporation cause us to overlook the historic and traditional purposes of a jury trial.

1. *Statement of the Case*

Arising out of a war contractor's claim for monetary compensation for a Government contract terminated by the appellee, the present controversy has been before State or Federal courts for more than a decade.

A full statement of the case and of the facts, with the appropriate Federal citations, is to be found in the opinion of the Court below, 128 F. Supp. 824, 830-837, which preceded the judgment from which the present appeal was taken. Since this protracted litigation already has elicited three reported opinions from the same District Judge, the Honorable James M. Carter, the opinion just mentioned will be referred to hereinafter as "No. 3". The two earlier District Court opinions will be designated by Federal Supplement citations.

On August 28, 1951, the appellant—the plaintiff below—requested a jury trial. On February 20, 1952, the District Judge granted the appellee's motion to

strike that demand. The Court's action is specified as error. Our present decision is confined almost entirely to that question alone.

2. *The Appellant's Request for a Jury Should Have Been Granted.*

Section 113(b) (1) and (2) of 41 USCA, which is part of the Contract Settlement Act of 1944, provides for two ways in which a war contractor who is "aggrieved by the findings of a contracting agency [here the RFC] . . . may, at his election" either appeal to the "Appeal Board" provided for in Subdivision (d) of the same section, *or* "bring suit against the United States" in the Court of Claims or in a United States District Court in accordance with Section 1346 of Title 28, Section 2402 of 28 USCA specifies that "Any action against the United States under Section 1346 of this title shall be tried by the court *without* a jury". [Emphasis supplied]

But Section 113(b) (2) specifies an exception to the non-jury rule:

> ". . . *except that,* if the contracting agency is the *Reconstruction Finance Corporation* [the *appellee herein*], or any corporation organized pursuant to the *Reconstruction Finance Corporation* Act, or any corporation owned or controlled by the United States, the suit shall be brought against such corporation in any court of competent jurisdiction *in accordance with existing law.*" [Emphasis supplied]

The statutory distinction made between suits against "the United States" and those against "any corporation owned or controlled by the United States [including the appellee herein]", is significant. The only applicable difference between Section 1346 and "existing law" is that, under Section 2402 of 28 USCA a suit *against the United States* under Section 1346 must be tried without a jury, while under "existing law" there is no such restriction.

In other words, the only rational explanation for the excepting clause in Section 113(b) (2) is that, while suits *against the United States* must be tried without a jury, suits against Government *corporations* are not so restricted, but are to be tried "in accordance with existing law".

We advance next, therefore, to a consideration of the "existing law" governing suits for "monetary compensation". See 128 F. Supp. at page 830.

Ordinarily, "the usual procedure of a district court in actions at law for money compensation" is one in which "the right to a jury is an incident". *United States v. Pfitsch,* 1921, 256 U. S. 547, 550, 552.

". . . the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Keifer & Keifer v. RFC,* 1939, 306 U. S. 381, 388.

While the appellee "acts as a governmental agency in performing its functions . . . still its transactions are akin to those of private enterprises and the mere

fact that it is an agency of the government does not extend to it the immunity of the sovereign." *RFC v. Menihan Corp.*, 1941, 312 U. S. 81, 83.

"In spawning these [governmental] corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such corporations discharging governmental functions, *and without exception the authority to-sue-and-be-sued was included.* Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope." [Emphasis supplied]. *Keifer & Keifer v. RFC, supra*, 306 U. S. at pages 390-391.

"But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment." *National Bank v. Republic of China*, 1955, 348 U. S. 356, 359.

The first of the two main grounds upon which the decision of the District Court on this jury-trial point is based is that "the section [113(b)] has been referred to as a method of appealing from the determination of the contracting agency", and that therefore "in the absence of an express statutory grant, no jury trial is available." *Monolith Co. v. RFC*, DC Cal., 1952, 102 F. Supp. 951, 953. As we have seen, however, the *appeal*

sub-paragraph (1) of Section 113(b) is separate and distinct from sub-paragraph (2), which deals in part with suits brought against RFC "in any court of competent jurisdiction in accordance with existing law."

The second ground for the District Court's holding that the appellant was not entitled to a jury was that an "analogous situation" is found in suits for "condemnation"; that in such actions, "there is no constitutional right to trial by jury . . . in the absence of a specific statutory grant." 102 F. Supp., supra, at pages 953-954. The lower court's reference to condemnation suits is unfortunate; for while a jury trial is not required in condemnation suits as a *constitutional* matter, in practice juries have often been used in such actions.

In *Louisville & Nashville R. Co. v. Western Union*, 6 Cir., 1918, 249 F. 385, 402, a condemnation case, the Court said:

> "Finding the amount of compensation is another term for assessing damages, and this always has been a recognized function of a jury."

In that case, *certiorari* was denied by the Supreme Court, 1918, 248 U. S. 576-577.

Similarly, in *Filbin Corporation v. United States*, DC S.C., 1920, 266 F. 911, 916, the Court used the following language:

> "It would seem absurd to say that, if the United States sued a man on a contract or for a tort, in which it sought to make him pay more than the sum of $20, it could not deprive him of the right

to have the issue tried by a jury, and then to say that, if the United States by virtue of any act of Congress desires to wrest from a man, under either requisition or condemnation, property claimed to be worth $1,000,000, . . . on that question, as to the *quantum* to be paid him, he is not entitled to a trial by jury!"

In *United States v. Theimer*, 10 Cir., 1952, 199 F. 2d 501, 503 the Court said:

"It had long been thought that there should be uniformity of procedure in Federal condemnation cases. Prolonged study had been given to the subject by the Advisory Committee of the Supreme Court. Different rules had been proposed, studied, revised and amended over a number of years, all of which finally culminated in Rule 71A [of the Rules of Civil Procedure] as it now exists. . . . Throughout all these studies runs the thought *that litigants should have the right of trial by jury of the issue of value except only in extraordinary and exceptional cases and that the commissioner provision of the Rule should be employed only in exceptional cases where because of peculiar circumstances trial by jury was inadvisable.*

. . .

"We, therefore, conclude that the parties to a condemnation proceeding are ordinarily entitled to a jury under Rule 71A(h) as a matter of right *and that where demand is made for the same the judge must grant a jury trial,* unless under the facts as they appear in the case because of the character, location, or quantity of the property to

> be condemned, or for other reasons revealed by the facts of the case, the interest of justice warrants the submission of question of value and compensation to a commission." [Emphasis supplied]

And in *United States v. Waymire,* 10 Cir., 1953, 202 F. 2d 550, 552, Judge Bratton said:

> "Under such provision in the rule [71A(h)] any party to a condemnation proceeding is ordinarily entitled as a matter of right to trial by jury of the issue of just compensation for the property taken if demand therefor is made within the time fixed in the rule."[1]

RFC says that "It is significant that we have been unable to find any case in which the Reconstruction Finance Corporation was subject to a trial by jury." RFC didn't look hard enough. There is such a case decided by the Supreme Court of a State lying within this Circuit. In *RFC v. Lyon,* Wash., 1934, 38 P. 2d 1029, it is stated that, "Trial of the cause to a jury resulted in a verdict in favor of the defendant [Lyon]." The case was affirmed, the Court saying:

> "All questions of fact are foreclosed by the jury's verdict in favor of respondent, . . . "

Finally, the appellee asserts that "Even if there were a right to a jury, it was waived by Monolith." It is pointed out that Rule 38(b) of the Federal Rules of Civil Procedure "provides that the demand for a

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[1]See also *United States v. 1146.32 Acres of Land,* DC Tex., 1955, 132 F. Supp. 681, 682.

jury trial must be served upon the other party not later than ten days after the service of the last pleading directed to an issue". The appellee's Answer and Counterclaim were filed on June 18, 1951. The appellant filed its Answer to the Counterclaim and its Request for Jury Trial both on the same day—August 28, 1951.

The appellee contends that the appellant's answer to the Counterclaim cannot be considered as being "directed to the issue involved in the complaint", and that therefore the request for a jury trial was filed too late. The appellant, however, correctly points out that the first paragraph of each cause of action of RFC's Counterclaim incorporates "each and every admission, denial and allegation contained in [RFC's] answer" to [Monolith's] first, second and third causes of action as though fully set forth herein". Furthermore, it is pointed out that though Monolith had generally alleged exhaustion of its administrative remedy, Monolith did not plead the RFC Findings in its Complaint. RFC, however, specifically incorporated such Findings in its Answer and Counterclaim.

Therefore the "last pleading directed to issue" of Monolith's complaint was Monolith's "Answer to Counterclaim" and its Request for Jury Trial filed concurrently therewith came within the requirements of Rule 38(b).

Accordingly, we hold that the Court below should have granted the appellant's request for a jury trial.

3. *The Remaining Issues.*

The complaint prays judgment for $247,134.51 for compensation for services rendered and for reimbursement for actual expenditures made by the appellant pursuant to certain agreements; for $139,876.55 "for reimbursement for actual disbursements and expenditures incurred in connection with the termination of outstanding purchase orders and contracts, completing property records," etc.; and for $173,131.06 "for disbursements and expenditures for the protection, maintenance and management of said plant," etc. This makes a total of $551,142.12.

In its "Final Judgment", the District Court decreed that the appellant "is entitled to judgment on its claims in the sum of $109,322.49, with interests at 2½% per annum from April 10, 1950, in the sum of $13,206.60, for a total of $122,529.09"; and that the appellee "is entitled to judgment on its injunction bond counterclaim in the sum of $151,274.96, with interest at 2% per annum from April 10, 1950, in the sum of $14,616.00, for a total of $165,890.96"; that "these sums be and are offset," and that appellant "take nothing in this action, and [appellee] recover of [appellant] the sum of $43,361.87."

In addition, the complaint asks for $600,000 for the cost of the completion of the alumina plant, and "readying said plant for operation"; for the additional sum of $1,500,000 for the cost of managing and operating that plant during an experimental test period "to determine the feasibility of obtaining large scale production of alumina by use of [appellant's] process"; and, finally,

"in the alternative and in the event that . . . [appellant] is not entitled to the relief prayed for . . . , [appellant] have judgment against the [appellee] in the sum of $7,500,000 as . . . general damages," etc.

We agree with the Court below that these last three claims are not proper under the Contract Settlement Act, *supra,* but sound in specific performance or breach of contract. No. 3, at page 837.

In these respects, as well as on the questions of the termination of the contracts, "fair compensation," etc., we hold that the District Court correctly narrowed the factual issues.

4. *Conclusion.*

We hold that Congress, in providing in 41 USCA, Section 113(b) (2), that suits against the appellee, *inter alios,* should be tried, "in accordance with existing law", intended that such suits should be tried by jury. The fact that the appellee is specifically mentioned in an *excepting* clause following a general provision for *non*-jury suits against the United States in accordances with Sections 1346 and 2402 of 28 USCA, confirms this view.

We also hold that the Court below correctly narrowed the factual issues.

Accordingly, the judgment is vacated and the case is remanded to the District Court with instructions to grant a jury trial.

(Endorsed:) Opinion. Filed Jan. 7, 1957.

Paul P. O'Brien, Clerk.

2. JUDGMENT OF NINTH COURT OF APPEALS (R. 347).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONOLITH PORTLAND MIDWEST COMPANY, a corporation, Appellant,	)	
vs.	)	No. 14,841
RECONSTRUCTION FINANCE CORPORATION, a corporation, Appellee.	)	

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court, for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is vacated, and that this cause be, and hereby is remanded to the said District Court with instructions to grant a jury trial.

(ENDORSED) Judgment
Filed and entered: January 7, 1957
PAUL P. O'BRIEN, Clerk.

B. STATUTES

1. PERTINENT PORTIONS OF THE CONTRACT SETTLEMENT ACT OF 1944, CHAPTER 358—PUBLIC LAW 395 [S. 1718], 41 U.S.C. 101, et seq.

An Act to provide for the settlement of claims arising from terminated war contracts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

OBJECTIVES OF THE ACT

Section 1. The Congress hereby declares that the objectives of this Act are—

(a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit:

(b) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement;

. . . .

DEFINITIONS

Sec. 3. As used in this Act—

(a) The term "prime contract" means any contract, agreement, or purchase order heretofore or hereafter entered into by a contracting agency and connected with or related to the prosecution of the war; and the term "prime contractor" means any holder of one or more prime contracts.

. . . .

(c) The term "war contract" means a prime contract or a subcontract; and the term "war contractor" means any holder of one or more war contracts.

(d) The terms "termination", "terminate", and "terminated" refer to the termination or cancellation, in whole or in part, of work under a prime contract for the convenience or at the option of the Government (except for default of the prime contractor) or of work under a subcontract for any reason except the default of the subcontractor.

. . . .

(g) The term "contracting agency" means any Government agency which has been or hereafter may be authorized to make contracts pursuant to section 201 of the First War Powers Act, 1941, and includes the Reconstruction Finance Corporation and any corporations organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, the Smaller War Plants Corporation, and the War Production Board.

(h) The term "termination claim" means any claim or demand by a war contractor for fair compensation for the termination of any war contract and any other claim under a terminated war contract, which regulations prescribed under this Act authorize to be asserted and settled in connection with any termination settlement.

. . . .

Sec. 6. (a) It is a policy of the Government, and it shall be the responsibility of the contracting agencies and the Director, to provide war contractors with speedy and fair compensation for the termination of any war contract, in accordance with and subject to the provisions of this Act, giving priority to contractors whose facilities are privately owned or privately operated. Such fair compensation for the termination of subcontracts shall be based on the same principles as compensation for the termination of prime contracts.

(b) Each contracting agency shall establish methods and standards suitable to the conditions of various war contractors, for determining fair compensation for the termination of war contracts on the basis of actual, standard, average, or estimated costs or of a percentage of the contract price based on the estimated percentage of completion of work under the terminated contract, or on any other equitable basis, as it deems appropriate. To the extent that such methods and standards require accounting, they shall be adapted, so far as practicable, to the accounting sys-

tems used by war contractors, if consistent with recognized commercial accounting practice.

(c) Any contracting agency may settle all or any part of any termination claim under any war contract by agreement with the war contractor, or by determination of the amount due on the claim or part thereof without such agreement, or by any combination of these methods. Where any such settlement is made by agreement, the settlement shall be final and conclusive, except (1) to the extent otherwise agreed in the settlement; (2) for fraud; (3) upon renegotiation to eliminate excessive profits under the Renegotiation Act, unless exempt or exempted under that Act; or (4) by mutual agreement before or after payment. Where any such settlement is made by determination without agreement, it shall likewise be final and conclusive, subject to the same exceptions as if made by agreement, unless the war contractor appeals or brings suit in accordance with section 13 of this Act: *Provided,* That no settlement agreement hereunder involving payment to a war contractor of an amount in excess of $50,000 (or such lesser amount as the Director may from time to time determine) shall become binding upon the Government until the agreement has been reviewed and approved by a settlement review board of three or more members established by the contracting agency in the bureau, division, regional or district office, or other unit of the contracting agency authorized to make such settlement, or in the event of disapproval by the settlement review board, unless

approved by the head of such bureau, division, regional or district office, or other unit. Failure of the settlement review board to act upon any settlement within thirty days after its submission to the board shall operate as approval by the board. The sole function of settlement review boards shall be to determine the over-all reasonableness of proposed settlement agreements from the point of view of protecting the interests of the Government. In determining, for purposes of this subsection, whether review of any settlement agreement is required because of the amounts involved, no deduction shall be made on account of credits for property chargeable to the Government or for advance or partial payments, but amounts payable under such settlement agreement for completed articles or work at the contract price and for the discharge of the termination claims of subcontractors shall be deducted.

(d) Except as hereinafter provided, the methods and standards established under subsection (b) of this section for determining fair compensation for termination claims which are not settled by agreement shall be designed to compensate the war contractor fairly for the termination of the war contract, taking into account—

(1) the direct and indirect manufacturing, selling and distribution, administrative and other costs and expenses incurred by the war contractor which are reasonably necessary for the performance of the war contract and properly allocable to

the terminated portion thereof under recognized commercial accounting practices; and

(2) reasonable costs and expenses of settling termination claims of subcontractors related to the terminated portion of the war contract; and

(3) reasonable accounting, legal, clerical, and other costs and expenses incidental to termination and settlement of the terminated war contract; and

(4) reasonable costs and expenses of removing, preserving, storing and disposing of termination inventories; and

(5) such allowance for profit on the preparations made and such work done for the terminated portion of the war contract as is reasonable under the circumstances; and

(6) interest on the termination claim in accordance with subsection (f) of this section; and

(7) the contract price and all amounts otherwise paid or payable under the contract.

The following shall not be included as elements of cost:

(i) Losses on other contracts, or from sales or exchanges of capital assets, fees and other expenses in connection with reorganization or recapitalization, antitrust or Federal income-tax litigation, or prosecution of Federal income-tax claims or other claims against the Government (except as provided in paragraph (3) above); losses on investments; provisions for contingencies; and premiums on life insurance where the contractor is the beneficiary.

(ii) The expenses of conversion of the contractor's facilities to uses other than the performance of the contract.

(iii) Expenses due to the negligence or willful failure of the contractor to discontinue with reasonable promptness the incurring of expenses after the effective date of the termination notice.

(iv) Costs incurred in respect to facilities, materials, or services purchased or work done in excess of the reasonable quantitative requirements of the entire contract.

The failure specifically to mention in this subsection any item of cost is not intended to imply that it should be allowed or disallowed. The Director may interpret the provisions of this subsection (d) and may provide for the inclusion or exclusion of other costs in accordance with recognized commercial accounting practice.

Where the small size of claims or the nature of production or performance or other factors make it impracticable to apply the principles stated in this subsection (d) to any class of settlements which are subject to this subsection (d), the contracting agencies may establish alternative methods and standards for determining fair compensation for that class of termination claims. The aggregate amount of compensation allowed in accordance with this subsection (excluding amounts allowed under paragraphs (3) and (4) above) shall not exceed the total contract price

reduced by the amount of payments otherwise made or to be made under the contract.

(e) In order to carry out the objectives of this Act, termination claims shall be settled by agreement to the maximum extent feasible and the methods and standards established under subsection (b) of this section shall be designed to facilitate such settlements. To the extent that he deems it practicable to do so without impeding expeditious settlements, the Director shall require the contracting agencies to take into account the factors enumerated in subsection (d) above in establishing methods and standards for determining fair compensation in the settlement of termination claims by agreement.

(f) Each contracting agency shall allow and pay interest on the amount due and unpaid from time to time on any termination claim under a prime contract at the rate of 2½ per centum per annum for the period beginning thirty days after the date fixed for termination and ending with the date of final payment, except that (1) if the prime contractor unreasonably delays the settlement of his claim, interest shall not accrue for the period of such delay, (2) if interest for the period after termination on any advance payment or loan, made or guaranteed by the Government, has been waived for the benefit of the contractor, the amount of the interest so waived allocable to the terminated contract or the terminated part of the contract shall be deducted from the interest otherwise payable hereunder, and (3) if after delivery of findings by a con-

tracting agency, the contractor appeals or sues as provided in section 13, interest shall not accrue after the thirtieth day following the delivery of the findings on any amount allowed by such findings, unless such amount is increased upon such appeal or suit. In approving, ratifying, authorizing, or making termination settlements with subcontractors, each contracting agency shall allow interest on the termination claim of the subcontractor on the same basis and subject to the same conditions as are applicable to a prime contractor.

(g) Where any war contract does not provide for or provides against such fair compensation for its termination, the contracting agency, either before or after its termination, shall amend such war contract by agreement with the war contractor, or shall authorize, approve or ratify an amendment of such war contract by the parties thereto, to provide for such fair compensation.

. . . .

Sec. 13. (a) Whenever the contracting agency responsible for settling any termination claim has not settled the claim by agreement or has so settled only a part of the claim, (1) the contracting agency at any time may determine the amount due on such claim or such unsettled part, and prepare written findings indicating the basis of the determination, and deliver a copy of such findings to the war contractor, or (2) if the termination claim has been submitted in the manner and substantially the form prescribed under this

Act, the contracting agency, upon written demand by the war contractor for such findings, shall determine the amount due on the claim or unsettled part and prepare and deliver such findings to the war contractor within ninety days after the receipt by the agency of such demand. In preparing such findings, the contracting agency may require the war contractor to furnish such information and to submit to such audits as may be reasonably necessary for that purpose. Within thirty days after the delivery of any such findings, the contracting agency shall pay to the war contractor at least 90 per centum of the amount thereby determined to be due, after deducting the amount of any outstanding interim financing applicable thereto.

(b) Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election—

(1) appeal to the Appeal Board in accordance with subsection (d) of this section; or

(2) bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of section 24 of the Judicial Code (28 U.S.C. 41 (20)), except that, if the contracting agency is the Reconstruction Finance Corporation, or any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, or any corporation owned or controlled by the United

States, the suit shall be brought against such corporation in any court of competent jurisdiction in accordance with existing law.

(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions:

(1) When any contracting agency provides a procedure within the agency for protest against such findings or for other appeal therefrom by the war contractor, the war contractor, before proceeding under subsection (b) of this section, (i) in his discretion may resort to such procedure within the time specified in this contract or, if no time is specified, within thirty days after the delivery to him on the findings; and (ii) shall resort to such procedure for protest or other appeal to the extent required by the Director, but failure of the contracting agency to act on any such required protest or appeal within thirty days shall operate as a refusal by the agency to modify its findings. Any revision of the findings by the contracting agency, upon protest or appeal within the agency, shall be treated as the findings of the agency for the purpose of appeal or suit under subsection (b) of this section. Notwithstanding any contrary provision in any war contract, no war contractor shall be required to protest or appeal from such findings within the contracting agency except in accordance with this paragraph.

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the find-

ings by the contracting agency, or (ii) in case of protests or appeal within the agency, within ninety days after the determination of such protest or appeal, or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with sub-section (b) of this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim.

(3) Notwithstanding any contrary provision in any war contract, the Appeal Board or court shall not be bound by the findings of the contracting agency, but shall treat such findings as prima facie correct, and the burden shall be on the war contractor to establish that the amount due on his claim or part thereof exceeds the amount allowed by the findings of the contracting agency. Whenever the Appeal Board or court finds that the war contractor failed to negotiate in good faith with the contracting agency for the settlement of his claim or part thereof before appeal or suit thereon, or failed to furnish to the agency any information reasonably requested by it regarding his termination claim or part thereof, or failed to prosecute diligently any protest or appeal required to be taken under subsection (c) (1) (ii) of this section, the Appeal Board or court (i) may refuse to receive in evidence any information not submitted to the contracting agency; (ii) may deny interest on the claim

or part thereof for such period as it deems proper; or (iii) may remand the case to the contracting agency for further proceedings upon such terms as the Appeal Board or court may prescribe. Unless the case is remanded, the Appeal Board or court shall enter the appropriate award or judgment on the basis of the law and facts, and may increase or decrease the amount allowed by the findings of the contracting agency.

. . . .

Sec. 17. (a) Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor.

(b) Whenever any formal or technical defect or omission in any prime contract, or in any grant of authority to an officer or agent of a contracting agency who ordered any materials, services, and facilities might invalidate the contract or commitment, the contracting agency (1) shall not take advantage of such defect or omission; (2) shall amend, confirm, or ratify such contract or commitment without consideration in order to cure such defect or omission; and (3) shall make a fair settlement of any obligation thereby cre-

ated or incurred by such agency, whether expressed or implied, in fact or in law, or in the nature of an implied or quasi contract.

(c) Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of section 13 of this Act.

(d) The Director shall require each contracting agency to formalize all such obligations and commitments within such period as the Director deems appropriate.

. . . .

GENERAL PROVISIONS

Sec. 20. . . . .

(e) Nothing in this Act shall be deemed to impair or modify any war contract or any term or provision of any war contract or any assignment of any claim under a war contract, without the consent of the parties thereto, if the war contract, or the term, provision, or assignment thereof, is otherwise valid.

. . . .

SHORT TITLE

Sec. 27. This Act may be cited as the "Contract Settlement Act of 1944."

Approved July 1, 1944.

2. PERTINENT PORTIONS OF THE WAR MOBILIZATION AND RECONVERSION ACT OF 1944, CHAPTER 480—PUBLIC LAW 458 [S. 2051], 50 U.S.C. APP. 1651 et seq.

An Act to amend the Social Security Act, as amended to provide a national program for war mobilization and reconversion, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—OFFICE OF WAR MOBILIZATION AND RECONVERSION

Section 101. (a) There is hereby established the Office of War Mobilization and Reconversion, which shall be headed by the Director of War Mobilization and Reconversion (hereinafter called the "Director").

. . . .

(b) The following agencies shall be placed within the Office of War Mobilization and Reconversion and shall exercise their functions subject to the general supervision of the Director:

(1) Office of Contract Settlement, created by the Contract Settlement Act of 1944.

. . . .

Sec. 202. Any contracting agency shall terminate prime contracts for war production whenever in the opinion of the agency the performance under such

contracts will not be needed for the prosecution of the war, and shall not continue performance under such contracts merely for the purpose of providing business and employment, or for any purposes other than the prosecution of the war, unless the Office of War Mobilization and Reconversion finds that the continuation of some or all of the work in process under any such contract will benefit the Government or is necessary to avoid substantial physical injury to a plant or property.

. . . .

Sec. 205. The Attorney General is directed to make surveys for the purpose of determining any factors which may tend to eliminate competition, create or strengthen monopolies, injure small business, or otherwise promote undue concentration of economic power in the course of war mobilization and during the period of transition from war to peace and thereafter. The Attorney General shall submit to the Congress within ninety days after the approval of this Act, and at such times thereafter as he deems desirable, reports setting forth the results of such surveys and including recommendations for such legislation as he may deem necessary or desirable.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 949

MONOLITH PORTLAND MIDWEST COMPANY, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California is reported at 128 F. Supp. 824. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 339-346) is reported at 240 F. 2d 444.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 7, 1957 (R.347). Petitions for rehearing, timely filed by both parties,[1] were denied on April 1, 1957 (R. 348). The

[1] Respondent's petition for rehearing in the Court of Appeals was directed to an issue not presented by the petition herein. See p. 8, *infra*.

petition for a writ of certiorari was filed on April 29, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in an action under the Contract Settlement Act of 1944, the holder of a terminated war contract could assert termination claims for compensation not previously filed with the Reconstruction Finance Corporation in accordance with the administrative procedures prescribed by the Act.

2. Whether, assuming the claims were properly before the court, they were in essence attempts to recover anticipatory profits and as such were not compensable under the Act.

3. Whether damages to the Reconstruction Finance Corporation which resulted from an injunction, accompanied by an injunction bond, previously obtained by petitioner were properly evaluated.

STATUTES INVOLVED

The pertinent provisions of the Contract Settlement Act of 1944, 58 Stat. 649, 41 U.S.C. 101 *et seq.*, and the War Mobilization and Reconversion Act of 1944, 58 Stat. 785, 50 U.S.C. App. (1946 ed.) 1651 *et seq.*, are set forth in the Appendix, *infra*, pp. 16-27.

STATEMENT

The facts as found by the district court (R. 246-292) and approved by the Court of Appeals (R. 340) may be summarized as follows:

Because the production of alumina and the expansion of capacity for such production was deemed necessary in the interests of the national defense, the De-

fense Plant Corporation, a former subsidiary of respondent,[2] entered into a contract with petitioner in June 1943 with regard to the extraction of alumina from native anorthosite ores by a new and untried process (R. 246-249). Initially, petitioner was to supervise the construction of a plant for that purpose. It was originally contemplated that the plant would cost approximately $3,885,000 (128 F. Supp. 824 at 832);[3] however, it was later found necessary to amend the contract to provide for a higher cost, not to exceed $4,639,048 (*id.* at 833).

Upon cessation of World War II military hostilities, the construction of the plant was not immediately terminated in view of a finding at that time by the Director of War Mobilization and Reconversion that continuation would benefit the Government (R. 256). Subsequently, however, the Director determined that it would be in the best interests of the Government to terminate the contract and, accordingly, petitioner was given a "stop work" notice on July 24, 1946 (R. 257). A notice of termination in accordance with Section 202 of the War Mobilization and Reconversion Act of 1944, 50 U.S.C. App. (1946 ed.) 1657 (*infra*, p. 26), was served on petitioner on September 10, 1946 (*ibid.*).[4]

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[2] In 1945, Congress dissolved Defense Plant Corporation and respondent succeeded to Defense Plant Corporation's rights and liabilities. Joint Resolution of June 30, 1945, c. 215, 59 Stat. 310.

[3] The district court's opinion was specifically incorporated by reference and made a part of that court's findings (R. 292).

[4] Petitioner misinterprets the facts when it implies its contract was terminated and thereupon taken over and completed by the Bureau of Mines (Pet. 2, 6, 10). It was not until 1951, during the Korean War and about five years after termination of the contract, that Congress appropriated money for the Bureau of Mines to operate the plant (R. 258). This was more than a year after the plant had been declared surplus by RFC (R. 258).

The prior action. Less than two months after the date of termination, petitioner brought suit in a California state court (R. 250). The action was removed to the United States District Court for the Southern District of California (*ibid.*). That court's judgment of dismissal on January 25, 1949, was affirmed on the ground that the Director's termination order was within his authority under Section 202 of the War Mobilization and Reconversion Act; that provision for fair compensation upon such termination is accorded by the Contract Settlement Act of 1944, 58 Stat. 649, 41 U.S.C. 101 *et seq.* (*infra,* pp. 16-26); and that petitioner had not exhausted the administrative remedies prescribed by that Act. *Monolith Portland Midwest Co.* v. *Reconstruction Finance Corporation,* 178 F. 2d 854 (C.A. 9), certiorari denied, 339 U.S. 932, rehearing denied, 339 U.S. 954. An injunction restraining RFC from taking possession of the aluminum plant, granted by the district court on February 10, 1949, upon the posting by Monolith of an injunction bond in the sum of $200,000, and thereafter continued by the Court of Appeals, remained in effect until Monolith's petition for certiorari was denied on April 10, 1950 (R. 287-288). The injunction bond covered all costs and damages "* * * on account of the issuance of the injunction, if the judgment appealed from were affirmed or the appeal dismissed" (R. 289).

This action. On January 16, 1950, Monolith commenced its administrative proceedings before the RFC pursuant to the procedures prescribed by the Contract Settlement Act (R. 251). Monolith submitted in substance the following monetary claims: No. 1—the sum of $635,381.26 "for expenditures made in acquiring

properties * * * and for its protection, legal and otherwise, and its maintenance and preservation," with interest at 7 per cent annually on the claim; No. 2—the sum of $600,000 to complete the plant; No. 3—the sum of $1,500,000 to operate the plant for a reasonable test period; No. 4—in the alternative, the sum of $7,500,000 to replace the plant. (R. 251-252.)

On June 7, 1950, RFC served on Monolith detailed and comprehensive findings and determinations (R. 252). RFC found that no money was due to Monolith on any of its claims except No. 1. With respect to the items allowed under this claim,[5] RFC found that Monolith was entitled to $109,322.49, plus interest at 2½ per cent per annum from April 10, 1950, to June 7, 1950, the date of the findings (128 F. Supp. at 835). RFC concluded that none of the other claims were proper termination charges under the agreement or the Contract Settlement Act, and that they were not costs incident to termination or settlement (*ibid.*). RFC further found that, as a result of damages and expenses incurred by operation of the injunction, Monolith was indebted to RFC in the sum of $460,229.26, plus interest at 2 per cent from April 10, 1950 (R. 252).

Aggrieved by the findings of the RFC on its claims, petitioner commenced this action in the Superior Court of the State of California, County of Los Angeles, on June 16, 1950 (R. 252). Respondent caused the action to be removed to the United States District Court for the Southern District of California (R. 252). Petitioner prayed for judgment of $551,-

[5] These items were referred to by the district court as "the reimbursables". 128 F. Supp. at 835. For a breakdown of the items thus allowed and not allowed, see R. 279-286.

142.12 as money due and owing under its first claim described above (R. 254). In addition, the complaint prayed for $600,000 for the cost of the completion of the plant, an additional sum of $1,500,000 to test run the plant for one year, and alternatively, damages of $7,500,000 for replacing the plant (R. 255). Monolith's request for a jury trial was denied by the district court on the ground that the Contract Settlement Act did not provide for trial by jury (R. 162-172).[6]

Monolith submitted a new claim for compensation at a pre-trial conference in the district court (R. 255). It stated for the first time that the fair compensation accorded by the Contract Settlement Act included the "value of its contract" with the Government (R. 255).[7] Monolith was later permitted by the court to amend its complaint to conform to its offer of proof that the value of its contract was in excess of $85,000,000 (R. 210-213).

In a 54-page opinion rendered after a trial lasting over three and one-half months, the district court held that RFC had correctly rejected petitioner's claim for $600,000 to complete the plant, for $1,500,000 to test run the plant, and the alternate claim for $7,500,000 to replace the plant, as being improper claims un-

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[6] The district court's separate opinion in connection with this issue is reported at 102 F. Supp. 951.

[7] Monolith submitted: "(1) that it had a contract to test the commercial feasibility of its process for extracting alumina from anorthosite; (2) that it had valid patents on the process; (3) that had tests been made of the commercial feasibility of the process as contemplated by the contract, it would have used its valid patents and process and its know-how in the field of alumina and cement manufacturing and preempted a large portion of the field of production of alumina and cement; (4) that [this "value of contract"] claim is for * * * an amount in excess of the seven or eight million dollars shown * * * in the complaint." (R. 255-256.)

der the Contract Settlement Act (128 F. Supp. 824). The court also recognized that it had erred in allowing Monolith to enlarge its claim beyond that which it had filed with the RFC on the ground that Monolith must first exhaust its administrative remedies by filing a claim with RFC for such amount and securing findings and determinations thereon (R. 295). The court further ruled that the alleged "value of the contract" upon which this inflated claim was based was, at best, a claim in the nature of general damages for future profits under the contract and, as such, was not permitted under the fair compensation clause of the Contract Settlement Act (R. 298).[8]

The court analyzed the findings and determinations of the RFC with respect to Monolith's claim for "reimbursables." Recognizing that such findings are to be treated as "*prima facie* correct" under the Act, 41 U.S.C. 113(c)(3), the court nevertheless subjected them to careful scrutiny. It concluded, however, that RFC's findings on this score were completely sound (128 F. Supp. at 875).[9] With respect to RFC's counterclaim of $460,229.26 on the injunction bond, the court ruled that such claim was limited to the period of time covered by the undertaking (February

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[8] The district court, in order to avoid a further protracted trial in event that it was in error in limiting Monolith's claims, had permitted both parties to introduce evidence on the so-called "value of the contract" (128 F. Supp. at 840). After extensively reviewing this evidence, the court stated that it feels it "is being extremely generous in fixing the value of the contract at the time of termination at the sum of $25,000" (R. 279).

[9] The court specifically noted that it had "minutely inspected the various findings and determinations made by RFC and is impressed with the accurate and painstaking manner in which the problems were discussed, evidence analyzed, and the findings made" (128 F. Supp. at 872, fn. 35).

10, 1949 to April 10, 1950), and not for the time prior thereto in which RFC had been also restrained from obtaining possession of the plant (R. 305). After examining RFC's claim for damages and expenses incurred by the injunction, and observing that insubstantial contrary evidence had been submitted (128 F. Supp. at 879), the court reduced RFC's claim to $151,274.96, with interest at 2 per cent per annum from April 10, 1950 (R. 313). After offset, the court decreed that RFC was entitled to recover $43,361.87 (*ibid.*).

On appeal, the court below held that it was error to deny Monolith's request for a jury (R. 339-346).[10] Although its opinion was devoted primarily to a discussion of the jury trial question, the court below nevertheless held that, in all respects, the district court had properly limited petitioner's claims for compensation (R. 346).

ARGUMENT

It is settled that the right to judicial review under the Contract Settlement Act is conditioned on the exhaustion of the prescribed administrative remedy and is specifically designed as a review of the administrative findings or to provide relief in the event that the contracting agency fails to make requested findings. *Monolith Portland Midwest Co.* v. *Reconstruction Finance Corporation,* 178 F. 2d 854 (C.A. 9), certiorari denied, 339 U.S. 932, rehearing denied, 339 U.S. 954. Having thus been defeated in a premature attempt to seek court relief, and then having submitted its claim for compensation to the RFC in accordance with the procedures prescribed by the Act, petitioner now at-

[10] Respondent intends to seek review of this question in this Court.

tempts to have this Court review a claim for compensation never submitted to the contracting agency—a claim based upon the alleged "'value of the contract" and represented by petitioner to be in the neighborhood of 85 million dollars (R. 256).[11] The district court's determination that this claim was improperly before it (128 F. Supp. at 841) was approved by the Court of Appeals (Pet. App. 11) and is correct. *Monolith, supra.*

Moreover, the courts below concluded that this claim for the "value of the contract", even if properly presented, was in essence nothing more than an attempt to recover anticipatory profits,, and, as such, was not an element of fair compensation under the Act. This holding is in full accord with the express language of the Contract Settlement Act and presents no conflict with any other court decision.

1. The courts below properly held that petitioner's claim for compensation, based upon the alleged "value of the contract," was improper as not having been submitted to the RFC.[12] The prior litigation in this matter held that Monolith's rights as the holder of a terminated war contract lay under the Settlement Act and

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[11] Including its alternate claim of $7,500,000 to construct a substitute plant, the sum of Monolith's claims filed with RFC totalled $10,235,381.26 (R. 251-252).

[12] In its amended complaint, petitioner combined its "value of the contract" theory with a *"quantum meruit"* theory—the latter based upon benefits allegedly conferred upon RFC (R. 210-213). This claim was also held to be improperly before the court (128 F. Supp. at 845). In addition, the court pointed out that Monolith was not relying upon the express provision in the Contract Settlement Act, 41 U.S.C. 117, for recovery on *quasi*-contracts, but was improperly attempting to recover for benefits lost, under the fair compensation provision of the Act (*id.* at 845-846). As indicated below, *infra*, pp. 11, 13, the court's determination in this respect is required by the Act.

were not independent thereof. *Monolith Portland Midwest Co.* v. *Reconstruction Finance Corporation,* 178 F. 2d 854 (C.A. 9), certiorari denied, 339 U.S. 932, rehearing denied, 339 U.S. 954. Those provisions of the statute which describe the terms upon which recourse to courts may be obtained by contractors contemplate prior administrative consideration of termination claims. Section 13(a), (b), (c) of the Contract Settlement Act of 1944, 41 U.S.C. 113(a), (b), (c). Appendix, *infra,* pp. 23-26. In these circumstances petitioner cannot justify its presence in court on a claim which the administrative body has never been given an opportunity to consider. Petitioner does not, and cannot, contend that it has ever submitted its 85 million dollar claim based upon either its "value of the contract" theory or *quantum meruit* theory to the RFC.[13] The record shows that petitioner first presented this new claim at a pre-trial conference in the district court (R. 255). The court subsequently recognized its error in permitting petitioner to increase its complaint to include this claim since it was beyond the scope of those filed with the RFC (R. 295).

Petitioner's failure to abide by the procedures prescribed by the Contract Settlement Act is dispositive of the case. *Myers* v. *Bethlehem Corp.,* 303 U.S. 41; *Macauley* v. *Waterman S.S. Corp.,* 327 U.S. 540; *Lichter* v. *United States,* 334 U.S. 742, 789-793. Petitioner does not suggest that the court's action, based upon petitioner's failure to exhaust administrative remedies, is improper. Rather, petitioner directs its

[13] As noted by the district court (128 F. Supp. at 837), petitioner has apparently abandoned its claims for $600,000 to complete the plant, for $1,500,000 to test run for one year, and its alternate claim for $7,500,000 to replace the plant, and relies completely on its "value of the contract-*quantum meruit*" theory.

entire attack to the alternative holding of the lower court, namely, that the claim, even if properly before it, was not compensable under the Contract Settlement Act. We show below that this holding also is correct.

2. Congress took special pains to define the nature of the compensation to be afforded war contractors whose contracts were subject to termination at the close of hostilities.[14] Express standards for determining costs, expenses, profit, and interest are set forth in the Act. See Section 6(a), (d) of the Contract Settlement Act, 41 U.S.C. 106(a), (d), Appendix, *infra,* pp. 17-21. Of special pertinence in view of petitioner's attempt to recover 85 million dollars on a contract to which the Government committed itself to an expenditure of less than 5 million dollars (R. 260) is the provision which states that "The aggregate amount of compensation allowed in accordance with this subsection * * * shall not exceed the total contract price reduced by the amount of payments otherwise made or to be made under the contract." 41 U.S.C. 106(d).[15]

It was these provisions that guided the RFC and the courts below in arriving at their determinations with respect to petitioner's claims for compensation. Petitioner raises no specific constitutional issue, but argues that "fair compensation" encompasses a broader

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[14] There were approximately 100,000 War Department prime contracts as well as 1,000,000 subcontracts involving a total of $43,000,000,000 at the time the Act was under consideration. The face amount of Navy contracts then in effect was $34,000,000,000. 90 Cong. Rec. 3908.

[15] Petitioner's assertion that the standards established by Section 6 apply only to the action of the contracting agency (Pet. 26) ignores the fact that proceedings in court, pursuant to Section 13, constitute a review of agency action.

standard than applied by the RFC and the lower courts in accordance with the terms of the statute. Insisting that its war contract has been "taken" by the Government, petitioner contends that the fair compensation to which it is entitled should be no less than the "just compensation" afforded by the Constitution upon any taking by the United States (Pet. 16-17). The short answer to this contention is that petitioner's contract was not "taken". As the court below recognized, the power and procedure for settling and adjusting termination claims under the Contract Settlement Act come into play only upon the exercise of the termination power created in the "contracting agency" by Section 202 of the War Mobilization and Reconversion Act. That petitioner's contract was lawfully terminated in accordance with the provisions of the Reconversion Act is now settled. *Monolith Portland Midwest Co.* v. *Reconstruction Finance Corporation, supra.* And petitioner cannot validly contend that the operation of either the Reconversion Act or the Contract Settlement Act, passed by Congress in the exercise of its war powers and designed to prevent a serious disruption of the economy of the country following the end of the war,[16] resulted in a "taking" of its property. Cf. *Lichter* v. *United States,* 334 U.S. 742 (Renegotiation Act).

Moreover, as the court below observed, even if the operation of the Acts constituted a "taking" of petitioner's war contract, the fair compensation provided under the Contract Settlement Act *was* just compensation under the Constitution. In the first place, the court found that Monolith's "value of the contract" and

[16] See 90 Cong. Rec. 3901-3905.

"quantum meruit" claim amounted to nothing more than a claim for general damages for benefits lost and an attempt to recover prospective profits from the contract venture (R. 298). Monolith does not controvert this finding; yet the very case upon which it so heavily relies squarely holds that the just compensation provided for in the Constitution was never meant to, and does not, include an allowance for anticipatory profits upon the Government's termination of war contracts. *De Laval Co.* v. *United States,* 284 U.S. 61; see also *College Point Boat Corp.* v. *United States,* 267 U.S. 12; *Russell Motor Car Co.* v. *United States,* 261 U.S. 514; *Enright* v. *United States,* 73 Ct. Cls. 416; *Nitro Powder Co.* v. *United States,* 71 Ct. Cls. 369; *Harrisburg Pipe & Pipe Bending Co.* v. *United States,* 67 Ct. Cls. 138; Gromfine and Edwards, *"Terminations After World War I,"* 10 Law and Contemporary Problems 563, 567-571. None of the "taking" cases relied upon by petitioner (Pet. 18, 19) are to the contrary.

Similarly, the Contract Settlement Act makes no provision for prospective profits, but does provide, among other compensatory factors, for "profit on the preparations made and work done for the terminated portion of the war contract as is reasonable under the circumstances." 41 U.S.C. 106(d)(5) (Appendix, *infra,* p. 20.)

3. As to Monolith's objections to the court's finding with respect to the RFC counterclaim (Pet. 29-30), petitioner conceded the claim to be properly before the lower court (Pet. 30).[17] RFC was seeking to recover

[17] Petitioner's argument that the RFC findings on the counterclaim were not entitled to weight finds no support in the statute. Obviously, it would be impossible to settle termination claims as the Act contemplates without considering counterclaims.

damages resulting from the operation of a restraining order and injunction obtained by Monolith in the prior litigation (R. 287-289). The injunction had been issued upon Monolith's posting an injunction bond of $200,000 "conditioned to pay all costs and damages * * * on account of the issuance of the injunction * * * " if Monolith was unsuccessful in the prior litigation (R. 289). The court limited RFC's claim for damages to the period covered by the injunction bond (R. 290). A reading of that portion of the lower court's opinion dealing with the damages to which it found RFC entitled (128 F. Supp. 824, 875-881) indicates that the court was fair to petitioner. The only element of damages to which petitioner now takes specific exception involves the sum awarded to RFC for depreciation of the plant during the period of the injunction. Contrary to Monolith's assertion, however, the court did not ignore its evidence. It accepted RFC's simple, straight-line depreciation at the rate of 4 per cent per year based upon a 25-year life for the plant only because no opposing evidence whatever was offered by petitioner on this score (R. 290), and because it did not consider significant Monolith's evidence as to reproduction costs of the plant, or evidence as to the sale or lease of three other alumina plants (*ibid.*). The straight-line method of depreciation, which was submitted by the RFC and adopted by the court, is a long-recognized accounting technique for calculating depreciation (see Grant and Norton, *Depreciation* (1955 ed.), pp. 87-159), and, in the circumstances of this case, was reasonably employed. Cf. Brandeis J. concurring in *Southwestern Bell Telephone Company* v. *Public Service Commission,* 262 U.S. 276, 294-269.

CONCLUSION

The issues presented by the petition were correctly decided by the court below. There is no conflict of decisions and no need for further review. It is therefore respectfully submitted that the petition for certiorari should be denied.

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MAY 1957.

APPENDIX

Contract Settlement Act of 1944 (58 Stat. 649, 41 U.S.C. 101 *et seq.*).

SECTION 1. The Congress hereby declares that the objectives of this Act are—

(a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;

(b) to assure to prime contractors and subcontractors small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement;

* * * * *

SEC. 3. As used in this Act—

(a) The term "prime contract" means any contract, agreement, or purchase order heretofore or hereafter entered into by a contracting agency and connected with or related to the prosecution of the war; and the term "prime contractor" means any holder of one or more prime contracts.

* * * * *

(c) The term "war contract" means a prime contract or a subcontract; and the term "war contractor" means any holder of one or more war contracts.

(d) The terms "termination", "terminate", and "terminated" refer to the termination or cancellation, in whole or in part, of work under a prime contract for the convenience or at the option of the Government (except for default of the prime con-

tractor) or of work under a subcontract for any reason except the default of the subcontractor.

* * * * *

(g) The term "contracting agency" means any Government agency which has been or hereafter may be authorized to make contracts pursuant to section 201 of the First War Powers Act, 1941, and includes the Reconstruction Finance Corporation and any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, the Smaller War Plants Corporation, and the War Production Board.

(h) The term "termination claim" means any claim or demand by a war contractor for fair compensation for the termination of any war contract and any other claim under a terminated war contract, which regulations prescribed under this Act authorize to be asserted and settled in connection with any termination settlement.

* * * * *

SEC. 6. (a) It is the policy of the Government, and it shall be the responsibility of the contracting agencies and the Director, to provide war contractors with speedy and fair compensation for the termination of any war contract, in accordance with and subject to the provisions of this Act, giving priority to contractors whose facilities are privately owned or privately operated. Such fair compensation for the termination of subcontracts shall be based on the same principles as compensation for the termination of prime contracts.

(b) Each contracting agency shall establish methods and standards, suitable to the conditions

of various war contractors, for determining fair compensation for the termination of war contracts on the basis of actual, standard, average, or estimated costs, or of a percentage of the contract price based on the estimated percentage of completion of work under the terminated contract, or on any other equitable basis, as it deems appropriate. To the extent that such methods and standards require accounting, they shall be adapted, so far as practicable, to the accounting systems used by war contractors, if consistent with recognized commercial accounting practice.

(c) Any contracting agency may settle all or any part of any termination claim under any war contract by agreement with the war contractor, or by determination of the amount due on the claim or part thereof without such agreement, or by any combination of these methods. Where any such settlement is made by agreement, the settlement shall be final and conclusive, except (1) to the extent otherwise agreed in the settlement; (2) for fraud; (3) upon renegotiation to eliminate excessive profits under the Renegotiation Act, unless exempt or exempted under that Act; or (4) by mutual agreement before or after payment. Where any such settlement is made by determination without agreement, it shall likewise be final and conclusive, subject to the same exceptions as if made by agreement, unless the war contractor appeals or brings suit in accordance with section 13 of this Act: *Provided,* That no settlement agreement hereunder involving payment to a war contractor of an amount in excess of $50,000 (or such lesser amount as the Director may from time to time determine) shall become binding upon the Government until the agreement has been reviewed and approved by a

settlement review board of three or more members established by the contracting agency in the bureau, division, regional or district office, or other unit of the contracting agency authorized to make such settlement, or in the event of disapproval by the settlement review board, unless approved by the head of such bureau, division, regional or district office, or other unit. Failure of the settlement review board to act upon any settlement within thirty days after its submission to the board shall operate as approval by the board. The sole function of settlement review boards shall be to determine the over-all reasonableness of proposed settlement agreements from the point of view of protecting the interests of the Government. In determining, for purposes of this subsection, whether review of any settlement agreement is required because of the amounts involved, no deduction shall be made on account of credits for property chargeable to the Government or for advance or partial payments, but amounts payable under such settlement agreement for completed articles or work at the contract price and for the discharge of the termination claims of subcontractors shall be deducted.

(d) Except as hereinafter provided, the methods and standards established under subsection (b) of this section for determining fair compensation for termination claims which are not settled by agreement shall be designed to compensate the war contractor fairly for the termination of the war contract, taking into account—

(1) the direct and indirect manufacturing, selling and distribution, administrative and other costs and expenses incurred by the war con-

tractor which are reasonably necessary for the performance of the war contract and properly allocable to the terminated portion thereof under recognized commercial accounting practices; and

(2) reasonable costs and expenses of settling termination claims of subcontractors related to the terminated portion of the war contract; and

(3) reasonable accounting, legal, clerical, and other costs and expenses incident to termination and settlement of the terminated war contract; and

(4) reasonable costs and expenses of removing, preserving, storing and disposing of termination inventories; and

(5) such allowance for profit on the preparations made and work done for the terminated portion of the war contract as is reasonable under the circumstances; and

(6) interest on the termination claim in accordance with subsection (f) of this section; and

(7) the contract price and all amounts otherwise paid or payable under the contract.

The following shall not be included as elements of cost:

(i) Losses on other contracts, or from sales or exchanges of capital assets, fees and other expenses in connection with reorganization or recapitalization, antitrust or Federal income-tax litigation, or prosecution of Federal income-tax claims or other claims against the Government (except as provided in paragraph (3) above); losses on investments; provisions for contingencies; and premiums on life insurance where the contractor is the beneficiary.

(ii) The expense of conversion of the contractor's facilities to uses other than the performance of the contract.

(iii) Expenses due to the negligence or willful failure of the contractor to discontinue with reasonable promptness the incurring of expenses after the effective date of the termination notice.

(iv) Costs incurred in respect to facilities, materials, or services purchased or work done in excess of the reasonable quantitative requirements of the entire contract.

The failure specifically to mention in this subsection any item of cost is not intended to imply that it should be allowed or disallowed. The Director may interpret the provisions of this subsection (d) and may provide for the inclusion or exclusion of other costs in accordance with recognized commercial accounting practice.

Where the small size of claims or the nature of production or performance or other factors make it impracticable to apply the principles stated in this subsection (d) to any class of settlements which are subject to this subsection (d), the contracting agencies may establish alternative methods and standards for determining fair compensation for that class of termination claims. The aggregate amount of compensation allowed in accordance with this subsection (excluding amounts allowed under paragraphs (3) and (4) above) shall not exceed the total contract price reduced by the amount of payments otherwise made or to be made under the contract.

(e) In order to carry out the objectives of this Act, termination claims shall be settled by agreement to the maximum extent feasible and the

methods and standards established under subsection (b) of this section shall be designed to facilitate such settlements. To the extent that he deems it practicable to do so without impeding expeditious settlements, the Director shall require the contracting agencies to take into account the factors enumerated in subsection (d) above in establishing methods and standards for determining fair compensation in the settlement of termination claims by agreement.

(f) Each contracting agency shall allow and pay interest on the amount due and unpaid from time to time on any termination claim under a prime contract at the rate of 2½ per centum per annum for the period beginning thirty days after the date fixed for termination and ending with the date of final payment, except that (1) if the prime contractor unreasonably delays the settlement of his claim, interest shall not accrue for the period of such delay, (2) if interest for the period after termination on any advance payment or loan, made or guaranteed by the Government, has been waived for the benefit of the contractor, the amount of the interest so waived allocable to the terminated contract or the terminated part of the contract shall be deducted from the interest otherwise payable hereunder, and (3) if after delivery of findings by a contracting agency, the contractor appeals or sues as provided in section 13, interest shall not accrue after the thirtieth day following the delivery of the findings on any amount allowed by such findings, unless such amount is increased upon such appeal or suit. In approving, ratifying, authorizing, or making termination settlements with subcontractors, each contracting agency shall allow interest on the termination claim of the subcontractor on the

same basis and subject to the same conditions as are applicable to a prime contractor.

(g) Where any war contract does not provide for or provides against such fair compensation for its termination, the contracting agency, either before or after its termination, shall amend such war contract by agreement with the war contractor, or shall authorize, approve or ratify an amendment of such war contract by the parties thereto, to provide for such fair compensation.

SEC. 13. (a) Whenever the contracting agency responsible for settling any termination claim has not settled the claim by agreement or has so settled only a part of the claim, (1) the contracting agency at any time may determine the amount due on such claim or such unsettled part, and prepare written findings indicating the basis of the determination, and deliver a copy of such findings to the war contractor, or (2) if the termination claim has been submitted in the manner and substantially the form prescribed under this Act, the contracting agency, upon written demand by the war contractor for such findings, shall determine the amount due on the claim or unsettled part and prepare and deliver such findings to the war contractor within ninety days after the receipt by the agency of such demand. In preparing such findings, the contracting agency may require the war contractor to furnish such information and to submit to such audits as may be reasonably necessary for that purpose. Within thirty days after the delivery of any such findings, the contracting agency shall pay to the war contractor at least 90 per centum of the amount thereby determined to be due, after deducting the amount of any outstanding interim financing applicable thereto.

(b) Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election—

(1) appeal to the Appeal Board in accordance with subsection (d) of this section; or

(2) bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of section 24 of the Judicial Code (28 U.S.C. 41 (20)), except that, if the contracting agency is the Reconstruction Finance Corporation, or any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, or any corporation owned or controlled by the United States, the suit shall be brought against such corporation in any court of competent jurisdiction in accordance with existing law.

(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions:

(1) When any contracting agency provides a procedure within the agency for protest against such findings or for other appeal therefrom by the war contractor, the war contractor, before proceeding under subsection (b) of this section, (i) in his discretion may resort to such procedure within the time specified in his contract or, if no time is specified, within thirty days after the delivery to him of the findings; and (ii) shall resort to such procedure for protest or other appeal to the extent required by the Director, but failure of the contracting agency to act on any such required protest

or appeal within thirty days shall operate as a refusal by the agency to modify its findings. Any revision of the findings by the contracting agency, upon protest or appeal within the agency, shall be treated as the findings of the agency for the purpose of appeal or suit under subsection (b) of this section. Notwithstanding any contrary provision in any war contract, no war contractor shall be required to protest or appeal from such findings within the contracting agency except in accordance with this paragraph.

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency or (ii) in case of protests or appeal within the agency, within ninety days after the determination of such protest or appeal, or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with subsection (b) of this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim.

(3) Notwithstanding any contrary provision in any war contract, the Appeal Board or court shall not be bound by the findings of the contracting agency, but shall treat such findings as prima facie correct, and the burden shall be on the war contractor to establish that the amount due on his claim or part thereof exceeds the amount allowed by the findings of the contracting agency. Whenever the Appeal Board or court finds that the war contractor failed to negotiate in good faith with the

contracting agency for the settlement of his claim or part thereof before appeal or suit thereon, or failed to furnish to the agency any information reasonably requested by it regarding his termination claim or part thereof, or failed to prosecute diligently any protest or appeal required to be taken under subsection (c)(1)(ii) of this section, the Appeal Board or court (i) may refuse to receive in evidence any information not submitted to the contracting agency; (ii) may deny interest on the claim or part thereof for such period as it deems proper; or (iii) may remand the case to the contracting agency for further proceedings upon such terms as the Appeal Board or court may prescribe. Unless the case is remanded, the Appeal Board or court shall enter the appropriate award or judgment on the basis of the law and facts, and may increase or decrease the amount allowed by the findings of the contracting agency.

War Mobilization and Reconversion Act of 1944 (58 Stat. 785, 50 U.S.C. App. (1946 ed.) 1651 *et seq.*).

SEC. 202. Any contracting agency shall terminate prime contracts for war production whenever in the opinion of the agency the performance under such contracts will not be needed for the prosecution of the war, and shall not continue performance under such contracts merely for the purpose of providing business and employment, or for any purposes other than the prosecution of the war, unless the Office of War Mobilization and Reconversion finds that the continuation of some or all of the work in process under any such contract will benefit the Government or is necessary to avoid substantial physical injury to a plant or property.

* * * * *

SEC. 601. When used in this Act—

* * * * *

(b) The term "contracting agency" means any Government agency which has been or hereafter may be authorized to make contracts pursuant to section 201 of the First War Powers Act, 1941, and includes the Reconstruction Finance Corporation and any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, and the Smaller War Plants Corporation.

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JOHN T. FEY, C

No. 949

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

MONOLITH PORTLAND MIDWEST COMPANY,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONERS' REPLY BRIEF

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Counsel for Petitioner.

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Petitioner's Reply Summarized as follows:

(1) Respondent confuses the distinction between claims, pleadings, evidence and applicable principles of substantive law .....

(2) The trial court found, and the Court of Appeals affirmed that Petitioner had exhausted condition precedent of filing the claim and obtaining *ex parte* findings 4

(3) The trial court long before trial or pre-trial declared the law to be that "fair compensation" was limited to expenses (called reimbursables) only 4

(4) One of the questions presented here is the correctness of this legal conclusion as Respondent admits 4

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PETITIONERS' REPLY BRIEF

Petitioner comes now and replies to respondents' Brief in Opposition as follows:

The Contract Settlement Act was designed to speedily discharge the Government's obligation to contractors whose contracts were terminated for the convenience of the Government. Congress directed "fair compensation" be paid. The present petition for

certiorari clearly and simply presents the question of what is compensation.

These basic facts are clouded by respondent's brief, which understandably deals in generalities, and never reaches the merits of the action.

In such an action, where the Government has solemnly by contract and statute pledged itself to pay compensation justly due, a scrupulously fair statement of the facts material to this Court's determination is required. Respondent's Brief is deficient in this regard. Whether such lapse is inadvertent is unimportant.[1] It is necessary to at least correct statements made concerning the word "claims", to avoid the contractual integrity of the Government being further impaired.

Respondent's brief ignores the facts of the case, including the Bureau of Mines' beneficial use of petitioner's process and plant, raised in the petition (pp. 20-23), after Petitioner's rights had been appropriated by the termination.[2]

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[1]This deficiency is probably due to the fact that Respondent's private counsel of ten years standing below, was superseded by the Attorney General's Office in the 30 day interval between denial of rehearing below and petition for certiorari.

[2]Respondent implies that the purpose of the Government in terminating was not to turn over the plant to the Bureau of Mines. (Brief, p. 3 footnote 4.) This is contrary to the record fact. (Exhibit B-F), and the fact the plant was turned over to the Bureau of Mines. This use of a pilot plant designed solely for the commercial testing of Petitioner's process, commencing about a year after the court action was filed, is relevant evidence of the reasonable amount *(quantum meruit)* of compensation justly due, as a result of Respondent's terminating the contract and thereafter the Government obtaining (we hope) all the benefits contemplated, when the contract was executed. If the Bureau of Mines' expenditure of $2,000,000 in the plant will free the nation from the Second World War's perilous dependence upon foreign bauxite to obtain alumina, it will be "cheap insurance", (Ex. 20, App. II, pp. 155, 173) even though the national economy is deprived of the process during these times of national defense. A public report of the Bureau's activities has never been made.

Respondent states (Brief, p. 12):

> ". . . the court *found* that Monolith's 'value of the contract' and 'quantum meruit' claim amounted to a claim for general damages . . . " (R. 298). Monolith does not controvert this *finding* . . ." (Italics added.)

This was not a "*finding*"; it is the Conclusion of Law, (R. 298) which petitioner has controverted at every stage of this case.

At page 6 of its Brief, Respondent asserts that Petitioner "submitted a new claim" at a pre-trial conference, quoting from the trial court's analysis of the complaint. However, at the critical point, it interpolates words of its own.

RFC's Quotation	*The Record, p. 256*
". . . (4) that (this 'value of contract') claim is for . . . an amount in excess of the seven or eight million dollars shown . . ."	". . . (4) That its claim is for the fair compensation to which it was entitled, including not only its reimbursables, but an amount in excess . . ."

Obviously, the trial court was at most analyzing one pleading and the principles of law applicable to the doctrine called "value of the contract" by the courts.

Respondent, when reciting the then known monetary allegations of Petitioner's complaint, (Brief, pp. 5-6) fails to advise the court that a ruling upon a cause of action for declaratory relief (Finding 21, R. 254) a year before the pre-trial had created the issue resulting in the question now before this court.

Petitioner's Reply may be summarized as follows:

(1) The Respondent confuses the distinction between claims, pleadings, evidence and applicable principles of substantive law;

(2) The trial court found, and the Court of Appeals affirmed, that Petitioner had exhausted the condition precedent of filing a claim and obtaining ex parte administrative findings;

(3) The trial court long before trial or pre-trial declared the law to be that "fair compensation" was limited to expenses (called reimbursables) only;

(4) One of the questions presented here is the correctness of this legal conclusion as Respondent admits;

(5) All the applicable cases hold that "compensation" must take into account factors other than mere expenses. Respondent has cited no case to the contrary;

(6) Respondent acknowledges the importance of the question, and the appropriateness of certiorari, by admitting it will seek certiorari itself.

Respondent has misstated material facts and confuses the distinction between claims, pleadings, evidence, and substantive law. Words are fluid tools. Many words are susceptible of ambiguity and multiple senses, due to the imperfections of language. The word "claim", upon which Respondent builds its

argument, is such a word. Respondent equates "claim" with legal principles or "theory of recovery" relied upon to justify a "claim". They are obviously not the same. Constant repetition cannot convert a principle of law into claim, a complaint, or the evidence to support a claim or complaint.[3]

Respondent's reliance (Brief, pp. 2, 8-11) upon an asserted non-exhaustion of an ex parte administrative remedy, is not supported by the record. Respondent's only applicable regulation provides: "Contractors may present their settlement proposals on any basis which would result in their receiving fair compensation for the termination . . ." The trial court found as a fact concerning Petitioner's claims: "24. Monolith has exhausted its administrative procedure under the Contract Settlement Act. It duly filed its claim with the RFC, and findings and determinations were made by the RFC." (R. 255)

On January 16, 1950, in a comprehensive document, Petitioner recited the history of this litigation to that date and then stated: "Monolith therefore is here and now taking every step which could be in anywise contemplated by either the War Mobilization Act or the Contract Settlement Act as a preliminary to the ultimate, possibly needed institution of the litigation

[3]Representative quotations from Respondent's Brief: ". . . review a claim" (p. 9); ". . . this claim . . ." (p. 9); "petitioner's claim" (p. 9); "this new claim" (p. 10); "on a claim the administrative body has never been given an opportunity to consider." (p. 10); "this claim" (p. 10); "increase its complaint to include this claim" (p. 10); "its 85 million dollar claim" (p. 10); "the claim" (p. 11); "'value of contract' and '*quantum meruit*' claim" (p. 13).

contemplated by the Contract Settlement Act in the event of Monolith's aggrievement with findings made by Reconstruction Finance Corporation or by its refusal to make findings." (Exhibit N, pp. 7-14)

Thereafter, Petitioner recited all claims known to it, including monetary claims for expenditures made in creating the pilot plant, costs of completing it, operating it and in the event the existing plant was not made available, the cost of constructing a new plant, which total sum Respondent admits is $10,000,000. Petitioner requested findings, notified Respondent that all its records were available, and stated it was willing to make any reasonable change in the form of these claims or to comply with any request to make the claims more definite and certain.

Congress provided in Section 20(f) of the Contract Settlement Act, "Any contracting agency may authorize or direct its officers and employees, as a part of their official duties, to advise, aid, and assist war contractors in preparing and presenting termination claims, ..."

Section 20(e) of the Act provides: "Nothing in this Act shall be deemed to impair or modify any war contract or any term or provision of any war contract or any assignment of any claim under a war contract, without the consent of the parties thereto, if the war contract, or the term, provision, or assignment thereof, is otherwise valid."

By its January 22, 1951 Opinion, almost two years before trial and one year before the pre-trial referred to by Respondent (Brief, p. 6), the court "declared the law" as to the meaning of "fair compensation" under the Act (95 F. Supp. 570, R. 88-106) pursuant to Petitioner's cause of action for declaratory relief.

The court there struck all allegations upon monetary claims except Petitioner's expenses (called reimbursables) incurred in creating the experimental pilot plant. (R. 106). Petitioner has continuously preserved this error (R. 323-324, Petition p. 2) and Respondent's references to the trial court's opinion after trial merely confirm the existence of this error.

Thus, Respondent's assertion that ex parte administrative findings were not exhausted and its reference to the $85,000,000 profits established by the evidence, disclosing the enormous profits made in the aluminum industry and the potential of Petitioner's patented process, should not prejudice clarification of the real questions presented. Respondent acknowledges the unsoundness of such a position when it assumes the condition precedent of presenting a claim and obtaining findings thereon, had occurred. (Brief, p. 2). What Petitioner sought below and was denied *as a matter of law*, was a ruling that the trier of fact must take into consideration when fixing the amount of compensation, evidence of the "value of the contract" as well as "costs of testing the process", profits and all other factors.

Respondent equivocates on this point by asserting that just compensation "does not include an *allowance* for anticipatory profits". (Brief, p. 13). What Petitioner contends is, in the words of this Court:

> ". . . the fact that the contract, if carried out, would be profitable is one of the circumstances . . . which . . . must be given its proper weight in fixing just compensation. But that is very different from an *allowance* of anticipated profits . . ." (*De Laval Steam Turbine Co. v. United States,* 284 U.S. 61, 72 (1931)).

None of the cases, including the *Russell* case, cited by Respondent are to the contrary. Indeed the decisions of this Court have frequently approved consideration of the "value of the contract" as an element in fixing compensation. (*Russell Motor Car Co. v. United States,* 261 U.S. 514, 1923; *Brooks-Scanlon Corporation v. United States,* 265 U.S. 106, 1924). The *College Point Boat Corporation* decision of this Court and the three Court of Claims decisions cited by Respondent (Brief, p. 13) distinguish "anticipated profits" as did this Court in the *De Laval Steam Turbine Co.* decision above quoted.

Respondent, the Government's financial agent in this transaction, disputes Petitioner's rights were "taken" by the termination with the intent to substi-

tute Bureau of Mines operation, (Brief, p. 12), but refuses to meet Petitioner's authority on this point.[4]

Respondent contends that Congress limited the historically judicial function of determining "compensation" by enumerating certain administrative standards in Section 6(d) of the Act. The Act required the agencies to take certain profits and the contract price (obviously production contracts) into consideration. Congress when identifying these standards introduces them with the words "taking into account . . ." followed by the enumeration of the standards. Other provisions of Section 6(d) and 6(b) require the agencies to apply other methods and standards if these will not result in fair compensation. Clearly, when Congress provided in Section 13(b) that an action could be brought "in a court of competent jurisdiction" "in accordance with existing law" and directed judgment be entered "on the basis of the law and facts," it intended that the usual rules of evidence and criteria for determining compensation should be applied, since every reported decision so holds. (Petition, p. 25)

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[4]The trial court apparently labored under the misapprehension that the RFC had not "taken" any thing of Monolith's and therefore the rules for determining compensation announced by the Supreme Court did not apply. (128 F. Supp. 824, 842). This was erroneous as a matter of law. In *United States v. General Motors Corporation*, 323 U.S. 373 (1944) the court clarified the meaning of a "taking" when it said: (p. 378)

> "In its primary meaning the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." (Petition, p. 19)

CONCLUSION

The court below remanded for jury trial. It erred in ruling that the trial court correctly limited the issues when declaring that Petitioner's compensation was limited to reimbursables only as a matter of law. This ruling is in conflict with the criteria for determining compensation laid down by this court in over 100 years of decisions. The ever increasing national defense program involving the contractual integrity of governmental agencies, necessitates a ruling by this court upon the admissible evidence to be considered when determining compensation. For the reasons stated in the Petition and the fact Respondent intends to petition for hearing, Petitioner prays its petition be granted.

Dated, June 7, 1957.

Respectfully submitted,

ENRIGHT & ELLIOTT
Of Counsel